Neutral Citation Number: [2010] IEHC 336

THE HIGH COURT

JUDICIAL REVIEW

2009 1049 JR

BETWEEN

SIMON KELLY

APPLICANT

AND

DISTRICT JUDGE DERMOT DEMPSEY AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice John MacMenamin dated the 14th day of July, 2010.

1. On 28th July, 2009, the applicant appeared in the Dublin Metropolitan District Court charged that on 24th October, 2008, he had in his possession at the North Circular Road, Dublin 1, a controlled drug, to wit Diamorphine (heroin) for the purpose of selling or otherwise supplying it to another in contravention of the Misuse of Drugs Regulations 1988 and 1993 made under s. 5 of the Misuse of Drugs Act 1977 contrary to ss. 15 and 27 (as amended by s. 6 of the Misuse of Drugs Act 1984) of the Misuse of Drugs Act 1977.

2. The applicant entered a plea of not guilty. The Court is aware that the prosecution evidence was presented by Garda Tara Dolan. However, the kernel of this case relates to events at the end of the prosecution evidence.

3. Thus the evidence in this case is simply confined to a description of what happened at that point. Mr. Michael O'Connor, solicitor for the applicant, deposes that he made an application for a direction on the basis that the applicant had no case to answer. This submission was based upon the prosecution's failure to prove in evidence the Misuse of Drugs Regulations 1988 (S.I. No. 328 of 1988) and the Misuse of Drugs Regulations (Amendment) Regulations 1993 (S.I. No. 342 of 1993). The applicant's case is that the tendering of the Regulations was an essential proof in a prosecution under the Misuse of Drugs Act 1977, as amended. In response, the first named respondent adjourned the case until 28th July, 2009, in order to receive legal submissions as to whether the failure to tender the Regulations was fatal to a prosecution under s. 15 of the Misuse of Drugs Act 1977, as amended.

4. On 28th July, 2009, the second respondent (Director of Public Prosecutions) was represented by his solicitor, Ms. Rachel Joyce.

5. Ms. Joyce submitted that the failure to hand in the Regulations was not fatal to a prosecution. She submitted that proof of the Regulations constituted evidence of a formal or technical nature and that the case might be reopened to admit this. Mr. Michael O'Connor repeated his submission that the proof of the Regulations was essential in a prosecution of this nature, and that furthermore, the Regulations made under the Act formed an essential *part* of the offence and it was therefore essential that they be proved. Mr. Michael O'Connor added that regulations made by statutory instrument were not the same as statutes, in that, while judicial notice might be taken of statutes, the same could not be said of statutory instruments.

6. The first respondent ruled that he was not prepared to allow the prosecution to reopen its case. However, the evidence indicates that he expressed surprise that the prosecution had not argued that he could take judicial notice of the Regulations. He referred, in particular, to the case of *DPP v. Collins* [1981] I.L.R.M. at p. 447. The solicitor acting on behalf of the second respondent then addressed him and quoted from that case, in particular, to the effect that a judge was entitled to take judicial notice of the making of regulations when their making was so notorious, well established, embedded in judicial decisions and susceptible of incontrovertible proof. The first respondent then held that he could in fact take judicial notice of the Regulations in question and his decision to convict was made on that basis.

7. The applicant was sentenced to three months imprisonment. The Court has been informed that, the applicant having served at least part of that sentence, is now on temporary release. The fact that the applicant has a conviction of this nature is, of course, a detriment and, therefore, it cannot be said that the issue is in any way moot.

8. Counsel for the applicant, Mr. Bernard Conden, S.C., who appeared with Mr. Gareth McCormack, B.L., and Ms. Eilis Brennan, B.L., who appeared on behalf of the respondents, agreed that the essential issues to be determined by this Court on this judicial review were as follows:-

(a) Whether the Regulations in question created the offence;

(b) Even if the Regulations did create the offence whether the trial judge was entitled to taken judicial notice of them nonetheless;

(c) Whether, in taking judicial notice of the Regulations, the judge acted in excess of jurisdiction;

(d) Whether the decision of the judge on that issue was amenable to judicial review.

9. These two questions may be conveniently considered together. Counsel for the respondents submitted that, having considered the matter, the District Judge was entitled to take judicial notice of the Regulations. In doing so he had adopted the Supreme Court authority of *Director of Public Prosecutions v. Collins* [1981] I.L.R.M. 447.

***Director of Public Prosecutions v. Collins* [1981] I.L.R.M. 447: what is the nature of the Regulation not proved?**

10. *Collins* was a case where the accused was convicted in the District Court of an offence under s. 49 (2) of the Road Traffic Act 1961, as amended, that is, driving a mechanically propelled vehicle while the concentration of alcohol in his blood exceeded the permitted level. Having been so convicted, the accused appealed to the Circuit Court where the judge stated a case for the opinion of the Supreme Court, *inter alia*, as to whether: (i) the form signed by the designated medical practitioner was duly completed in the manner required by s. 21 of the legislation in that the line upon which the doctor's name was meant to be entered was left blank; (ii) whether the prosecution must give *prima facie* evidence of the Regulations in a manner prescribed by s. 4 (1) of the Documentary Evidence 1925, that is, by production of a copy of *Iris Oifigiúil* purporting to contain them or by the production of a copy of the regulations printed by the stationery office. Other issues raised in the case stated are not material to the issues here.

11. In *Collins*, Henchy J. held that since the form was signed by the designated medical practitioner it was a duly completed form under the Act. Furthermore, he held at p. 451 that a judge was entitled to take judicial notice of the making of regulations when their making is so "notorious, well established, embedded in judicial decisions and susceptible of incontrovertible proof". However, it is necessary to advert to the nature of the Regulations that were in question in *Collins* and the context of those observations.

12. Henchy J. observed that he, as well as every judge who dealt with prosecutions involving these Regulations, could not ignore the fact that the Regulations had been made by the Minister for the Environment under the power on that behalf vested in him under s. 26 of the Road Traffic (Amendment) Act 1978, and that they had been published by the stationery office as statutory instrument No. 193 of 1978. He added at p. 451:

> "Judgments have issued from this and other courts which specifically acknowledge the due making of the Regulations. There must have been hundreds of prosecutions in which prima facie evidence of the Regulations was given in accordance with s. 4 (1) of the Documentary Evidence Act 1925 by the production of a copy published by the Stationery Office. Our judicial experience so informs us. If, as a result of the mere mischance that such a copy was not produced in this case, a judge were to hold that the prosecution must fail for want of proof of the Regulations, such self-induced judicial blindness would bring the administration of the law into disrepute. I reluctantly but unavoidably categorise this defence point as worthless. Whatever thin technicality it represents is outweighed by the fact that the due administration of justice requires that when the making of the Regulations is so notorious, well-established, embedded in judicial decisions, and susceptible of incontrovertible proof, a judge could not but take judicial notice of their making."

13. In the course of his judgment, the judge drew a distinction between different kinds of regulations. In particular, that distinction lay in the question as to whether the regulations in question were an evidential *proof* or whether, by way of contrast, the regulations actually *created* the offence with which an applicant had been convicted. In the latter case, he observed that failure to prove regulations which created an offence could be a fatal defect to a prosecution case. The precise terms of the passage are of some importance. At p. 449 4 of the report Henchy J. stated:

> "2. Is it necessary in a prosecution such as this for the prosecution to give prima facie evidence of the Regulations in a manner prescribed by s. 4 (1) of the Documentary Evidence Act 1925?
>
> The latter subsection allows prima facie evidence of the Regulations to be given by the production of a copy of the *Iris Oifigiúil* purporting to contain them *or* by the production of a copy of the Regulations printed under the superintendence or authority of and published by the Stationery Office. This statutory permission to treat as prima facie evidence the *production* in either of the prescribed ways was necessary because regulations, rules, orders or bye-laws (or any kind of statutory instrument) could not ordinarily be given judicial notice. Thus, it was held in *The People (Attorney General) v. Kennedy* [1946] IR 517 by the Court of Criminal Appeal that failure to prove in accordance with s. 4 (1) of the 1925 Act, the *Emergency Order* creating the offence of which the appellant had been convicted, was a fatal defect in the prosecution case; so the conviction was quashed."

14. He continued:

> "In *The People (Attorney General) v. Griffin* [1974] IR 416 the accused had been convicted in the Circuit Court of a drug offence created by Regulations made under the *Dangerous Drugs Act*, 1924. The Court of Criminal Appeal, following *Kennedy's case*, quashed the conviction but granted a certificate of leave to appeal to this Court under *s. 29 of the Courts of Justice Act, 1924*, the certified point being whether there was jurisdiction in the circumstances to order a retrial. The report of *Griffin's case* in this Court (which held that there was no jurisdiction to order a retrial) shows that the prosecution had conceded in the Court of Criminal Appeal that the decision in *Kennedy's case* had made it impossible to stand over the conviction in *Griffin's case*."

15. In *Collins,* Henchy J. specifically emphasised more than once that it is the *production* of a specified version of a regulation that enabled a court to treat that version as being *prima facie* evidence of the document. But he added at p.450:

> "Thus it is that the courts routinely act on the Stationery Office version of a piece of delegated legislation (such as Rules of Court) no less than they act on the Stationery Office version of a statute. *They do so under the enabling powers bestowed on them by the 1925 Act, and it makes no difference whether the case is civil or criminal, or, if criminal, whether the piece of delegated legislation in question has created the offence charged. In the latter event, however, the courts are likely to hold (as they did in Kennedy's case and in Griffin's case) a conviction to be bad for failure to produce the designated version of the piece of delegated legislation creating the offence, for without such production the existence or the precise ingredients of the offence may be in doubt; and, further the court may be deprived of an opportunity of ensuring that the accused will not be convicted (in breach of Art. 15, s. 5, of the Constitution) for an act which had not been declared to be an infringement of the law at the date of its commission.*" (Emphasis added)

The judge concluded at p.450:

> "However, it is important to observe that the power given by s. 4 (1) of the 1925 Act to treat as prima facie evidence the mere productions of the designated version of the instrument in question is enabling only. It does not extinguish or curb the inherent power of a court in certain circumstances to treat particular matters as worthy of judicial notice, and so to be acted on as if they had been formally proved. That is the position when a course of judicial conduct is so inveterate and unquestioned and of such a nature that it necessarily postulates the existence and validity of a statutory instrument. In such circumstances the court is entitled to take judicial notice of the statutory instrument …"

The distinction made in *Collins* between different forms of Regulation

16. The rationale of the distinction made by Henchy J. is important. It is that, first, in the absence of proof of regulations creating the offence, the existence of the precise ingredients of the offence may be in doubt; and second, that a court might be deprived of an opportunity of ensuring the accused would not be convicted for an act which had not been declared to be an infringement of the law at the date of its commission.

17. Thus it may be seen that the proof of a regulation *creating* an offence is an element or ingredient of one or more constitutional guarantees. The constitutional provision referred to by Henchy J. was Article 15.5 which provides:-

> "5. The Oireachtas shall not declare acts to be infringements of the law which were not so at the time of the date of their commission."

The Regulations in this case

18. The provisions under which the applicant was convicted are part of a complex code of legislation. That legislation contains a number of exceptions and exemptions as well as designations and definitions of prohibited susbstances. Thus I consider it cannot be thought that the regulation (which it is accepted creates the offence) is some mere empty shibboleth. An illustrative example of the distinction, chosen by Henchy J. in *Collins*, was that of *The State (Taylor) v. Circuit Judge of Wicklow & Others* [1951] I.R. 311 where there had been a failure on the part of a prosecution to demonstrate that the relevant part of the Road Traffic Act 1933 on foot of which the accused had been convicted, had been brought into operation. In the subsequent State application, Davitt J. stated at p.321:

> "[The Circuit Court Judge] said he had been administering the Road Traffic Act since he came upon the Bench and that he was perfectly well aware that it *was in force*."

This appears to me, of its very essence, to be a sound and reasonable view to take.

19. In her able argument counsel for the respondents submits that the Misuse of Drugs Regulations have now been in effect for many years. Thus, she contends, the judge was entitled to take judicial notice of them. Counsel submitted that this was not a case where the Regulations had simply not been proved, but rather, one where, in the absence of such proof, the judge had nonetheless decided that he could take judicial notice of them. It was submitted that authorities apparently to the contrary effect, were decisions of the Court of Criminal Appeal. Such cases permitted that Appeal Court to consider the entirety of the evidence by way of contrast to this, a judicial review. Counsel contended the first respondent was entitled to follow the *Collins* case, or in the event that he was in error, such error was within jurisdiction.

20. The fact that the Regulations created the offence cannot be in dispute. The essential questions therefore are whether the District Judge fell into error in taking judicial notice of the Regulation. If he did err, was that error such as would go to jurisdiction? The answer to this question lies, I think, in a consideration as to the nature of the first respondent's decision. Was the deficiency in the prosecution case simply a technical issue? Did it concern a mere evidential deficiency?

21. There is clear authority that judicial review will not be granted simply on the ground of a lack of evidence to support a finding of a trial judge (*Buckley v. Kirby* [2000] 3 I.R. 431).

22. In *Buckley*, Geoghegan J. at p.435 quoted O'Brien L.C.J. in *R. (Martin) v. Mahoney* [1910] 2 I.R. 695 when he said at p. 707 of the report:-

> "To grant *certiorari* merely on the ground of *want of jurisdiction*, because there was no evidence to warrant a conviction, confounds, as I have said, want of jurisdiction with error in the exercise of it. The contention that mere want of evidence to authorise a conviction creates a cesser of jurisdiction, involves, in my opinion, the unsustainable proposition that a magistrate has, in the case I put, jurisdiction only to go right; and that, though he had jurisdiction to enter upon an inquiry, mere miscarriage in drawing an unwarrantable conclusion from the evidence, such as it was, makes the magistrate act without and in excess of jurisdiction."

23. This passage was proved and adopted by Dunne J. in *Grodzicka v. Judge Ní Chondúin & Director of Public Prosecutions* [2009] I.E.H.C. 475, (Unreported, High Court, Dunne J., 30th October, 2009). There the applicant had claimed that the decision of a District Judge to grant an amendment to a charge sheet had resulted in an error of law such that the decision should be quashed. Dunne J. rejected that argument and held that any error made, if at all, would have been an error within jurisdiction, and therefore, not a matter for judicial review. Moreover, she found that if the applicant were to be convicted on foot of the amended charge sheet the applicant could appeal to the Circuit Court or, alternatively invoke the procedure of appeal by way of case stated.

24. In *Farrelly v. Devally* [1998] 4 I.R. 76 Morris J. held at p. 82 that an error of law would have to be "extreme" for a court to intervene in judicial review. He relied in this regard on *Anisminic Ltd. v. Foreign Compensation Commission and Anor*. [1969] 2 A.C. 147 approved by McMahon J. in *The State [Cork County Council] v. Fawsitt* (Unreported, High Court, McMahon J., 13th March, 1981) where that judge posited the test as being whether there had been "an extreme example of an error of law". See, also *Harte v. Labour Court* [1996] 2 I.R. 171, where Keane J. at p. 178 put the test as being one where an applicant:

> "… would have to demonstrate that the error was of such a nature that a hearing, admittedly commenced within jurisdiction, culminated in a decision which was in law a nullity." (See also *Roche v. District Judge Martin* [1993] I.L.R.M. 651).

25. To similar effect in *Lennon v. Judge Clifford* [1996] 2 I.R. 590 the applicant was convicted in the District Court on foot of failing to deliver to an appropriate tax inspector prescribed forms for income tax for relevant chargeable periods. He sought an order of *certiorari* quashing the convictions arguing that since the prosecution had not established any statutory basis for the prescribed form, the District Judge had acted in excess of jurisdiction in accepting the certificate of the inspector as evidence of non-compliance. The High Court (O'Hanlon J.) refused to grant the relief sought on the basis that the application was outside the scope of the *certiorari* remedy sought. This decision was upheld in the Supreme Court (Hamilton C.J., O'Flaherty and Murphy JJ.), which held that regardless of whether the prosecution was required to point to a statutory basis for the prescribed form, it was the function of the trial judge to evaluate the evidence before him. In a judicial review application it was not for the High Court to say whether it

would have come to the same conclusion as that reached by the trial court. Murphy J. pointed out that while there might have been some merit to the arguments made by the applicant, such points could not be made in a judicial review application observing that the function of determining whether a form emanating from the Revenue Commissioners was in the "prescribed" format was a matter for the trial judge to evaluate and not for a review court.

26. However, the question which arises here is whether this is, properly speaking, a "*sufficiency* of evidence" case at all? Or does the failure to prove these Regulations go to the root of the prosecution's case and thereby raise the issue of jurisdiction?

The applicant's submission – the Regulations were fundamental; they create the offence; the deficiency goes to jurisdiction

27. Counsel for the applicant submitted that the invariable practice in prosecutions under s. 15 of the Misuse of Drugs Act 1977 cases is that the prosecution must prove the Regulations upon which they rely in proof of its case. This is invariably done by handing into court a copy of the Regulations published by the stationery office. Counsel points to the very nature of the charge preferred against the applicant and in particular to the reference to "… Article 4 (1) (b) of the Misuse of Drugs Regulations 1988". Reference to the Regulations should be part of the indictment (see Charleton's *Criminal Law* (Butterworths), Dublin, 1999)). He submits this is so because the Regulations are an integral part of the statement of the offence – the Regulations create the offence they are not simply part of the "evidence".

28. In the first place, I am not persuaded that any distinction should be drawn between decisions of the Court of Criminal Appeal and those in judicial review for the purposes in this, a discrete point of law. It is of course true that the appeal court has access to the earlier transcript. It has not been suggested that any further point of evidence would be relevant as evidence.

29. Second, going to the fundamental issue, I find that as recently as *Director of Public Prosecutions v. Daniel Cleary* [2005] 2 I.R. 189, a case concerning the sale or supply of controlled drugs, the Court of Criminal Appeal, in following *Griffin's* case held, that the weight of authority was in favour of the contention that it was incumbent on the prosecution to prove the relevant regulations in the manner prescribed by the Documentary Evidence Act 1925.

30. At the conclusion of the judgment in *Cleary*, McGuinness J., at p. 199 speaking on behalf of the court, quoted with approval Davitt J. in *People (Attorney General) v. Kennedy* [1946] I.R. 517 to the following effect:

> *"…Every fact necessary to establish the guilt of an accused person must be proved clearly and beyond reasonable doubt. Not merely that, it must be proved in evidence at the trial… The proper way to establish the fact that the orders in question were properly made in exercise of the powers conferred by the Act of 1939 was by proving that fact by evidence, either by one of the methods provided by s. 4 of the Documentary Evidence Act 1925 or otherwise. This was not done. It is not sufficient to establish, if it could be established, that the Special Criminal Court itself had knowledge of what ought to have been proved in evidence."*

31. The judge went on to observe at pp. 199-200 that:-

> *"In The People (Attorney General) v. Griffin [1974] I.R. 416 where the issues were closely analogous to the present case, this court followed the Kennedy decision. The Supreme Court raised no query as to the correctness of that decision, noting that counsel for the prosecution had conceded at p. 419 'that the matter was ruled by the decision in Kennedy's case to the effect that in the absence of proof of the making of the relevant statutory instrument, the conviction could not stand.'"*
>
> *The Supreme Court went further in ruling that in such circumstances this Court had no power to order a retrial, Henchy J. stated at p. 420:-*
>
> > *'In my opinion, when a conviction is quashed because the prosecution failed to tender the evidence necessary to sustain a conviction, the accused should not be subject to the worry of a retrial in which the prosecution could mend its hand, unless there is clear statutory authority for such course. Section 5 of the Act of 1928 provides no such authority."*

32. McGuinness J. was careful to point out in Cleary that in the *Attorney General v. Martin Parke* [2004] I.E.S.C. 100, (Unreported, Supreme Court, 6th December, 2004) both Murray C.J. and Denham J., in holding that formal proof of the Misuse of Drugs Regulations was not necessary in an *extradition* matter, had been careful to distinguish between the situation in such an issue and that which obtains in a criminal trial.

33. Finally, McGuinness J. specifically drew attention to the passage from Henchy J.'s judgment at p. 450 in *Collins* (cited earlier) when he drew a vital distinction between delegated legislation which created the offence and delegated legislation which related to some form of evidential proof. This vital distinction is still perceived as fundamentally important.

34. It was re-emphasised in a judgment of the Court of Criminal Appeal in *The People at the Suit of the Director of Public Prosecutions v. Keith Murray* [2005] I.E.C.C.A. 31, (Unreported, Court of Criminal Appeal, 10th March, 2005). On the weight of this authority, I do not consider that the Regulations in question here were merely "routine". It is accepted that in fact they define the offence.

35. The decision of the first respondent not to reopen the prosecution case was one which pre-eminently lay within his discretion. Save for the most unusual circumstances, I do not consider it in itself would be amenable to judicial review. Thus this Court must approach the situation as being one where the District Judge in the exercise of a non reviewable discretion and in the absence of a formal proof thereof took judicial notice of a regulation which formed part of the actual definition of the offence. In my view, this falls within the distinct (jurisdictional) category identified by Henchy J. in the *Collins* case. What was not proved here was, to quote, a "piece of delegated legislation [which] has created the offence charged".

36. In *People (Attorney General) v. Griffin* [1974] I.R. 415, s. 14 of the Dangerous Drugs Act 1934 provided that any person who acts in contravention of a Regulation made under that Act was to be guilty of an offence. The subsequent Regulations of 1937 were made pursuant to the 1934 Act. Article 9 of the Regulations provided that no person should be in possession of any substance to which the Regulations applied, which included cannabis resin. Section 15 (1) of the Misuse of Drugs Act 1977, as amended, similarly provides:-

> "Any person who has in his possession, whether lawfully or not, a controlled drug for the purpose of selling or supplying it to another in contravention of regulations made under s. 5 of the Act shall be guilty of an offence."

The definition of the offence is subject to the provisions of the Regulation and in particular s. 4 (1) (b) of the Misuse of Drugs Regulations 1988 that a person shall not supply or offer to supply a controlled drug.

37. The relationship of the Regulation to the charge in the instant case is, therefore, almost directly analogous to that which obtained in *Griffin's* case. I find it is not merely a question of sufficiency of evidence: it goes to the question of whether the charge before the court is sufficiently defined and identified in all its ingredients. On the weight of the authorities, I find that the judge was not entitled to take judicial notice of the Regulations. What was in issue therefore was an error in excess of jurisdiction and not within it. It is thereby amenable to judicial review. I must grant the relief sought.

38. I would add that, as Kenny J. observed in *King v. Attorney General* [1981] I.R. 233 at p. 263:-

> "It is a fundamental feature of our system of government by law (and not by decree or diktat) that citizens may be convicted only of offences which have been specified with precision by the judges who made the common law, or of offences which, created by Statute, are expressed without ambiguity."

Later at pp. 263-264 that judge observed:-

> "There is Irish authority for the proposition that a person may be convicted of a criminal offence only if the ingredients of, and the acts constituting, the offence are specified with precision and clarity. O'Byrne J. in delivering the judgment of the Court of Criminal Appeal in *The Attorney General v. Cunningham* said at p. 32 of the report … 'Court must have regard to the fundamental doctrine recognised in these Courts that the criminal law must be certain and specific, and that no person is to be punished unless and until he has been convicted of an offence recognised by law as a crime and punishable as such.' O'Byrne J. quoted these words and approved of them when he was a judge of this court: see *The People (Attorney General) v. Edge* [1943] I.R. 115 at p. 142.

He concluded at p. 264:-

> "Article 38, s. 1 of the Constitution provides: 'no person shall be tried on any criminal charge save in due course of law.' If the ingredients of the offence charged are vague and uncertain, the trial of an alleged offence based on these ingredients is not in due course of law"

These observations also reflected in the judgments of O'Higgins C.J. and particularly by Henchy J. at p. 257 of the report.

Remittal to the District Court?

39. There remains the issue then as to whether, even in the light of this finding the matter should be remitted to the District Court. I am persuaded that this Court, in the exercise of its discretion, should not take this course. In the first place, the situation here is unusual in that the applicant has already served part if not all of the sentence which it is intended he should serve. He is already on temporary release. What then would be the purpose of remittal? I am persuaded that to adopt such a course of action would in the instant case be futile, otiose and unjust. I will grant the order sought by the applicant without any order for remittal.