Neutral Citation Number: [2007] IEHC 405

THE HIGH COURT
JUDICIAL REVIEW

[2007 No. 48 J.R.]

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND
DISTRICT JUDGE MARY DEVINS

RESPONDENT

AND
MICHAEL MC CORMACK

NOTICE PARTY

Judgment delivered by Mr. Justice O'Neill on the 4th day of December 2007

1. The issues which arises for determination in this case is whether or not, there should issue from this court an order of *mandamus* to the respondent directing her to hear and determine the application by the applicants to have re-entered a summons against the notice party, in which it is alleged that the driving by the notice party of a mechanical vehicle, on 25th August, 2005 at Drummindoo, Westport in the County of Mayo was dangerous to the public contrary to s. 53(1) of the Road Traffic Act, 1961.

2. By order of this court (Peart J.) of 22nd January, 2007, the applicant was given leave to pursue certain reliefs by way of judicial review, the first of these reliefs was an order of *mandamus* directing the respondent to hear and determine the complaint that the notice party on 25th August, 2005 at Drummindoo, Westport, Co. Mayo drove a vehicle which having regard to all the circumstances was dangerous to the public contrary to the s. 53(1) of the Road Traffic Act, 1961. In addition he was granted leave to pursue an order of *certiorari* of an order made by the respondent on 11th September, 2006 in the District Court area of Westport whereby the respondent made an order striking out the aforesaid charge.

3. Notwithstanding, the foregoing leave granted, it is now common case between the parties, that having regard to the circumstances of the case, the only appropriate relief now to be sought is an order of *mandamus* directing the respondent to hear and determine the applicants application to re-enter the summons in respect of the aforesaid charge.

4. The background to this matter is as follows.

> It is alleged that on 25th August, 2005 at Drummindoo, Westport, Co. Mayo, the notice party attempted to perform a u-turn on the main Castlebar to Westport road in the process of which he turned into the path of a motor cyclist, one Mark Sheridan, who as a result of the collision between his motor cycle and the notice party's vehicle suffered very severe injuries. The incident was witnessed by two independent witnesses, a Lawrence Murphy from Middlesex in England and Adrian Shanaher from Tempelogue in Dublin.
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> In due course an application was made for a summons and the same was issued on the 2nd February, 2006 returnable for the 4th May, 2006. When the matter came before the District Court it was adjourned on a number of occasions but ultimately the date of trial was fixed for 7th September, 2006. On that date no judge was available and the entire District Court list for the day was adjourned to 11th September, 2006. On the 11th September, 2006 the State, on that occasion represented by Inspector Martin Byrne, was unable to proceed with the prosecution because of the unavailability of prosecution witnesses. All of the prosecution witnesses had been available on 7th September, 2006. The injured party Mr. Sheridan had postponed surgery in order to give evidence on that date, but his surgery was re scheduled for 8th September, 2006. On 11th September, 2006 Mr. Sheridan was not available, nor could Lawrence Murphy arrange to travel back from England at such short notice.
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> As between the affidavits sworn on behalf of the applicant and the affidavit sworn by Patrick J.M. Durkan the solicitor who appeared for the notice party in the District Court, on all occasions when the matter was before the District Court, there is a significant conflict as to precisely what happened in the District Court on the 11th September, 2006. It was averred by Superintendent Doyle and Inspector Byrne that complaint had been made by Mr. Durkan on behalf of the notice party on the ground of delay in the prosecution. Mr. Durkan however, at para. 11 of his affidavit is adamant that no such complaint was made by him and he states that the only submission he made was to the effect that an adjournment of the case would be a cause of inconvenience to the notice party, as the 11th September. 2006 was the fifth occasion he was in court to answer the charge brought against him.

5. As the averment made by Mr. Durkin is one which is arguably against his interest I am disposed to accept his account of what transpired.

6. It is clear that the respondent, notwithstanding, that the matter had been adjourned from 7th September, to the 11th September 2006, for reasons which were no fault of the prosecution, took a decision to strike out the summons because the prosecution was not in a position to proceed on that date. I accept that the decision of the respondent to strike out was not as a result of a hearing by her of a complaint of delay, and a determination to strike out the proceedings on that ground.

7. On the 11th November, 2006 the summons was reissued by the District Court and on the 7th December, 2006 the applicant made an application to the respondent to re-enter the summons. Again there is a difference in the evidence on affidavit between Superintendent Doyle and Mr. Durkan as to what happened in the District Court on the 7th December, 2006.

8. Paragraph 23 of the affidavit of Superintendent Doyle says the following:

> "23. I say and believe that directions were obtained from the applicant who directed that the summons on 11th day of (November) 2006. Summons was reissued on the original complaint and came before the respondent. The respondent indicated that she believed the applicant was outside the time limit for making a complaint, namely six months, however in any event the matter could not be re-entered as she had disposed of same in definitive manner by striking out the summons on the 11th September, 2006. She declined to re-enter the matter. The respondent stated that as the matter was not properly before her she was going to strike it out. I indicated that if she was of the view that the matter was not properly before her, it would be more appropriate to make no order. She made no order on the application. I beg to defer to a true copy of the aforesaid order upon which mark the letter "D". I have signed my name prior to the swearing

hereof."

9. Mr. Durkin at para. 13 of his affidavit says the following:

> "13. When the notice party's case was called on 7th December, 2006, I appeared on behalf of the notice party and stated that this was a matter which had previously been before the court on the 11th September, 2006, I made no comment or submission other than this. The respondent then stated that she was of the opinion that that matter was not properly before the court and that she intended to strike it out. The respondent did not elaborate on her reasons for this view or her understanding in law as to why that was the case. I say and believe that Superintendent Doyle's affidavit is incorrect in this regard as the respondent did not state, as alleged, that the matter could not be re-entered as she had disposed of it in a definitive manner by striking out the summons on the 11th December, 2006. The respondent was silent on this point. No submissions were made or objections raised by Superintendent Doyle in response to the comments that were made by the respondent. In particular no submissions were made or facts referred to by or on behalf of the applicant, which would have suggested to the respondent that she was wrong in her view that if the matter was not properly before her.
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> 14. The sole submission made by Superintendent Doyle, before the court on the 7th December, 2006 was to suggest to the respondent that if the matter was deemed not to be properly before the court that the most appropriate course of action would be to make no order. The respondent acceded to this request and made no order."

10. For the applicant in these proceedings it is submitted that in refusing to embark upon a hearing for the purposes of re-entering the summons and in purporting to strike out the summons but ultimately making no order on the application, the respondent declined to exercise a jurisdiction which was invested in her and which she was required to exercise and discharge by virtue of the fact that the matter appeared before her in a court list in the ordinary way on the 7th December, 2006 and hence because of that refusal of jurisdiction an order of *mandamus* directing her to hear and determine the application to re-enter the summons should be made against the respondent.

11. For the notice party it is submitted that the failure of the prosecution on 7th December, 2006 to have informed the respondent of what had transpired on 11th September, 2006 so as to have removed any misunderstanding or mistaken view the respondent may have had of what had transpired previously in the case; and the failure of the prosecution to have made any submissions to the respondent in opposition to the view which was stated by the respondent, and to the course which she indicated she proposed to take, on 7th December, 2006, had the result that the prosecution cannot now complain in these proceedings that the respondent declined or refused to exercise her jurisdiction, the prosecution having by their conduct on 7th December, 2006 waived their right to place any reliance on the complaint that the respondent had declined or refused to exercise her jurisdiction. In this respect the notice party relied upon the case of the *State (Cronin) v. Circuit Court Judge of the Western Circuit* [1937] 1 I.R. 34. It was further submitted that a necessary prerequisite of the issuance of an order of *mandamus*, is that the party seeking the same must make an express and unequivocal demand to the party against whom the order is sought, to perform the duty, the performance of which is sought to be compelled. In this respect the notice party relies upon the case of the *State (Modern Homes (Ireland) Limited) v. Dublin Corporation* [1953] 1 I.R. 202.

12. It would seem to me that on either version of what happened in the District Court on 7th December, 2006 the respondent did not enter upon and exercise her jurisdiction to hear and determine the issue of whether or not this summons should have been re-entered. Whether this was the result of an erroneous and pre-determined view of her own or whether it was the result of a mistaken view of what had transpired on 11th September, 2006 is not known, and in reality does not matter. The end result is the same and it is that she did not exercise her jurisdiction to hear and determine the matter which was properly before her, namely, whether this summons should be re-entered.

13. It could very well be said that this situation may have been contributed to by ineffective advocacy on the part of the prosecution in failing to have informed her of what had previously transpired and in failing to have dissuaded her from the course which she indicated she was going to take.

14. Even if that is taken to be the case, in my view it could not amount to a waiver by the applicant of his right to place reliance upon, and complain in these proceedings of the failure of the respondent to have entered upon, and exercised her jurisdiction. There is a very clear difference between the circumstances of this case and those revealed in the *State (Cronin) v. The Circuit Court Judge of the Western Circuit*. In that case the State Solicitor having been given several hours to consider the point which had been made against him, returned to the court and expressly conceded the point stating that it was unanswerable. Nothing of the kind has occurred in this present case. The failure by the prosecution to have deterred or dissuaded the respondent from doing that, which she clearly indicated her intention to do, whilst as said already, might be criticised as ineffective advocacy, but it could have no greater consequences, such as constituting a waiver as is submitted for the notice party.

15. I am further of the opinion that there is no merit in the notice party's second submission, to the effect that a separate demand should have been made of the respondent before an application for *mandamus* could be made. It is of course the case that where an order of *mandamus* is sought against a statutory body to compel it to carry out its statutory duty, there must first be directed to it a demand which is in unequivocal terms and there must be shown to be either an express refusal of that demand or a refusal implied from conduct.

16. A court in the discharge of its jurisdiction is in an entirely different position. Where a judge has jurisdiction to hear and determine a particular matter and when that matter is properly before that judge by being listed in the ordinary way under the normal practices of the court, and where that judge declines to exercise his or her jurisdiction to hear and determine that matter, no further demand need be made of that judge to hear and determine the matter in question, as a prerequisite to obtaining an order of *mandamus*.

17. Although the jurisdiction of the High Court to issue orders of *mandamus* against judges of other courts is a jurisdiction which is to be exercised rarely and sparingly, it has never been suggested before, that a separate demand as would be appropriate where other statutory bodies are concerned, is required. I am satisfied that it is not. Indeed, the point is well illustrated in the following passages from the judgments in the case of *R. (McGrath) v. Clare Justices* [1905] 2 I.R. 510. At p. 514 Palles C.B. said the following:

> "In the result, then, we have on the records of the Quarter Sessions Court an appeal, which the court had jurisdiction to entertain, which the court does not appear to have heard, which they certainly have not determined on the merits; but which, as it seems to me, they have declined to entertain upon a preliminary point, which is bad in law.
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> Therefore, there is no difficulty in directing them, by *mandamus*, to proceed to act in the jurisdiction, which for a reason

> invalid in law, they have declined to exercise; …"

18. At p. 518 Johnson J. says the following:

> "This court is not a court of appeal from the Quarter Sessions, and if the Court of Quarter Sessions had, within their jurisdiction, heard and decided the appeal on its legal merits, or merits in fact, though their adjudication might have been wrong in our opinion, yet this court could not interfere by certiorari or require them to rehear the appeal which they had heard and decided; but if on a preliminary objection, no matter at what stage of the case made …, the Quarter Sessions erroneously hold on their mistaken view of the law in the consideration of the conviction … and, without exercising their jurisdiction to hear and determine the appeal on the merits, either of law or fact (as was their duty), reverse on this preliminary objection the order of the justices at Petty Session that is an erroneously declining to exercise their jurisdiction; and therefore I think a writ of certiorari should issue to bring up and quash that order of Quarter Sessions, and that a writ of *mandamus* should issue to the Quarter sessions to enter continuances and to hear and determine the appeal …"

19. There was no suggestion that a separate demand should have been made of the Court of Quarter Sessions in that case to exercise its jurisdiction, before a *mandamus* could issue.

20. I am satisfied that having regard to the failure or refusal by the respondent to have exercised her jurisdiction to hear and determine the application to re-enter the aforesaid summons, it is appropriate that an order of *mandamus* should issue to compel the respondent to hear and determine the applicants application to re-enter that summons.