

THE HIGH COURT

[2013 No. 565JR]

BETWEEN

JOSEPH KENNEDY

APPLICANT

AND

DISTRICT JUDGE CONAL GIBBONS

RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

JUDGMENT of Mr. Justice Hogan delivered on 20th February, 2014

1. Where the imposition of penalty points in respect of a traffic offence is made mandatory by statute and where the accused does not dispute the offence, does a District Court judge have any jurisdiction to strike out the proceedings in return for the accused making a donation to the court poor-box? This is the essentially the issue which is presented by the present application for judicial review.

Some preliminary observations

2. Before considering the actual facts of this case, some preliminary observations may be called for. First, the actual origins of the court poor box system is uncertain and remains shrouded in mystery. As the Law Reform Commission observed in its Consultation Paper, *The Court Poor Box* [2004] IELRC CP 31 at paras. 1.03-1.06:

"It is incontrovertible that the court poor box system is a long established tradition, predating the foundations of the State. It has been suggested by some that its provenance can be linked to the alms box as administered by the Church in feudal times. Others suggest that the roots of the concept can be found in the Brehon laws....Under Brehon law, the relief of the destitute was the responsibility of a relieving officer appointed for that purpose; this officer was empowered to levy a rate on landowners for the maintenance of the "wretched and wandering poor"..... It has also been suggested that the court poor box has as its origin the "Elizabethan Poor Law". The statute 43 Elizabeth c. 2, 1601 "An Act for the relief of the poor".....concerned the imposition of the poor rate and its administration, with section 15 providing:

'That all the surplusage which shall be remaining in the said stock of any county, shall by discretion of the more part of the justices of the peace in their quarter session be ordered, distributed, and bestowed for the relief of the poor hospitals of that county, and of those that shall sustain losses by fire, water, the sea, or other casualties, and to other charitable purposes, for the relief of the poor, as to the more part of the said justices of the peace shall seem convenient.'

Although it is thus possible to identify a number of possible sources from which the court poor box system evolved, it is not possible to state with certainty which, if any, of these sources is the antecedent. Perhaps it may be the case that the concept evolved from an amalgam of these sources. Nevertheless, it is beyond doubt that the practice of allowing an offender to make a payment to the court poor box as an alternative to conviction and sentence where, in the circumstances of the case, the court takes the view that a conviction would be unduly harsh, is now regarded by some judges as a familiar feature of the common law, and applied accordingly. However, its application remains solely a matter for individual judges, and it is beyond doubt that there is serious inconsistency in the use of the court poor box... Whilst there are many reasons for the non-application, or limited application, of the court poor box it may well be that a factor in some judges' hesitation in utilising the court poor box is the somewhat uncertain status the court poor box enjoys in Irish law."

3. It may well be that the practice ultimately evolved from the days in which justices of the peace (the precursor of the modern District Judges) had a variety of duties, not all of them judicial. Some of those responsibilities included the administration of the poor laws, so that it would perhaps have been only natural that income from fines was then applied by the self-same justices to assist with their non-judicial duties, including the relief of the poor.

4. While the practice has itself no statutory basis and while there is a paucity of case-law on the point, the poor box system was nevertheless so widespread and inveterate through out the State both before and after 1922, that it must accordingly be regarded as part of the common law which was carried over into our modern legal system by Article 50.1 of the Constitution, its obscure and uncertain origins notwithstanding. Although, moreover, the existence of such a jurisdiction is not to be found in any of the acknowledged sources - such as textbooks or decisions of venerable judges of some antiquity - referencing the pre-1937 common law which was carried over on the coming into force of the Constitution, its existence is nonetheless such an embedded feature of our legal system that it must be now regarded as part of that common law, if only by reference to the principle *communis error, facit jus*.

5. The Supreme Court has made it clear that the courts should be reluctant to upset established practice without good reason. As Henchy J. explained in *Mogul of Ireland Ltd. v. Tipperary (N.R.) County Council* [1976] I.R. 260, 273 - admittedly in the context of overruling past decisions of long standing - that:

"Even if the later Court is clearly of opinion that the earlier decision was wrong, it may decide in the interests of justice not to overrule it if it has become inveterate and if, in a widespread or fundamental way, people have acted on the basis of its correctness to such an extent that greater harm would result from overruling it than from allowing it to stand."

6. In the present context it may be said that the poor box system is so inveterate, established and of long standing that its existence as part "of the repertoire of remedies available in limited circumstances to judges of the District Court to apply where the facts of the particular case suggest that the higher interests of justice would be best served by doing so" must now be universally accepted: see *Director of Public Prosecutions v. Ryan* [2011] IEHC 280, [2011] 3 I.R. 641, 653, per Kearns P.

7. Second, if the existence of the poor box as part of the common law inheritance must now be accepted in the manner which I have indicated, then the extent to which this common law practice is to be abrogated, qualified or even abolished remains entirely a matter for the Oireachtas. There may be some who think that the existence of such a practice operates as a salutary and humane check on the possible harshness of the sentencing system while also providing a source of revenue for needy and deserving charities. There may be others who think the continued existence of such a practice is unsatisfactory and that it enables the affluent (and others) to escape the proper strictures of the criminal justice system, while simultaneously eroding a source of revenue for the State.

8. If, however, the law is considered to be unsatisfactory inasmuch as it allows for the continued existence of the poor box system, then any change in this regard would represent a policy judgment which is exclusively committed to the Oireachtas by Article 15.2.1 of the Constitution.

The circumstances of the present case

9. Turning now to the facts of this case, the applicant pleaded guilty in the District Court to the offence of speeding, contrary to s. 47 of the Road Traffic Act 1961 (as inserted by s. 11 of the Road Traffic Act 2004) and s. 102 of the Road Traffic Act 1961 (as amended by s. 18 of the Road Traffic Act 2006). The Court was informed that the applicant was a pensioner who had no previous convictions and District Judge Gibbons had been invited to strike out the proceedings and to accept a donation to the court poor box *in lieu* of a formal conviction.

10. It might be noted that it would have been open to the applicant to pay a fixed fine charge of €80 together with two penalty points had the fine been paid within 28 days from the date the notice first issued. If this notice is disregarded, the fine then increases to €120 which must be paid within a further 28 days. It is only after this period that a District Court summons is issued.

11. In the case of a first time offence, the maximum penalty is €1,000, together with an endorsement of four penalty points on the applicant's driving licence. Section 2(2) of the Road Traffic Act 2002 ("the 2002 Act") (as amended) provides that:

"Where a person is convicted of a penalty point offence, the number of penalty points specified in column (5) of the First Schedule opposite the mention of the offence in column (2) of that Schedule shall, subject to and in accordance with the provisions of this Act, be endorsed on the entry relating to the person in respect of the offence."

12. Reference No. 7 of the First Schedule of the 2002 Act provides for four penalty points following conviction for the offence of exceeding a speed limit. Completing the picture, s. 55 of the Road Traffic Act 2010 provides that s. 1(1) of the Probation of Offenders Act 1907 does not apply to a penalty point offence.

13. The applicant's principal complaint is that the District Judge effectively refused to consider the possible application of a legitimate sentencing option, namely, the acceptance of a donation to the poor box *in lieu* of a formal conviction. This presents the more fundamental question as to whether that option was in fact open to him in respect of an offence such as this.

14. While speed is undoubtedly a major factor in road accidents and road deaths, it must nevertheless be acknowledged that the offence in the present case was a petty one. In particular, no suggestion was advanced that the offence was other than purely routine in character or that the applicant's speed posed an immediate danger to other road users. Recalling the applicant's personal circumstances – a pensioner who had led a blameless life with no previous convictions – his case might be thought by many to have presented the Court with an ideal opportunity to utilise the poor box jurisdiction.

15. The Court nevertheless declined to consider this option and proceeded to convict the applicant. The real question, therefore, is whether the District Judge had any other option in the circumstances. For the reasons I will now set out, I find myself obliged to conclude that he had no such option.

16. The critical point here is that the Oireachtas has imposed a statutory scheme of mandatory penalties (i.e., the penalty points regime) following conviction for certain road traffic offences. In these circumstances it must be accepted that the Oireachtas has thereby supplanted the common law and in the process has greatly restricted the District Judge's sentencing options in respect of those offences.

17. The decision of Ó Caoimh J. in *Director of Public Prosecutions v. Maughan*, High Court, 3 November 2003 is, perhaps, the closest case on point. In that case the District Judge accepted a donation to the poor box *in lieu* of convicting the accused of the offence of drunk driving. The facts were admittedly exceptional, in that the accused had suddenly been roused from his bed by a message informing him that his father was seriously ill in hospital. The accused was in the course of driving to the hospital in response to that urgent summons when he was arrested for drunk driving. It was later determined that his blood alcohol level exceeded the statutory maximum and the accused indicated that he would plead guilty to the offence.

18. Ó Caoimh J. nevertheless held that the District Judge had acted *ultra vires* by taking this admittedly humane and perfectly understandable course:

"...as he was obliged at the time to determine the case before him and to proceed in accordance with law to enter a conviction and to impose a penalty as required by law. He was not entitled to strike out the charge, notwithstanding the circumstances outlined to him by the notice party's solicitor at the time. While these indicate that the notice party might not have driven but for the fact that he was requested to visit his father in hospital, it is clear that such circumstances do not and cannot afford a defence to the offence as charged against the notice party...."

19. The critical feature of that case is that s. 49(7) of the Road Traffic Act 1961 ("the 1961 Act") (as inserted by s. 10 of the Road Traffic Act 1994) expressly provided that the s. 1(1) of the Probation of Offenders Act 1907, does not apply to such an offence. It is at least implicit in the judgment of Ó Caoimh J. that in view of this latter disapplication of the Probation of Offenders Act 1907 by virtue of s. 49(7) of the 1961 Act the District Court judge must of necessity proceed to conviction where the facts and the law so warranted. Putting matters another way, Ó Caoimh J. concluded that the terms of s. 49(7) of the 1961 Act necessarily excluded informal sanctions short of formal conviction, such as the acceptance of a donation to charity and the striking out of the charges.

20. To my mind, the present case is indistinguishable in principle from *Maughan*. Just as in that case, the Oireachtas has here prescribed a mandatory penalty and sanction upon conviction, namely, the endorsement of four penalty points upon the offender's licence. As we have already noted, s. 55 of the Road Traffic Act 2010 also provides for the disapplication of the Probation of Offenders Act 1907 to speeding offences and other traffic offences.

21. The cumulative effect of these statutory provisions is to override the District Court's power at common law to accept a donation to the poor box *in lieu* of proceeding to a formal conviction in the case of those road traffic offences which attract the application of penalty points on a mandatory basis.

22. It is true that in *Ryan Kearns P.* held that the District Judge in that case was entitled to accept a donation to the poor box following a plea of guilty in respect of the offence of sexual assault *in lieu* of a formal conviction for that offence. It is also true that the offence of sexual assault is inherently graver and more serious than the offence of speeding. The essential difference, however, between this case and *Maughan* on the one hand and *Ryan* on the other is that the Oireachtas has elected for policy reasons to provide for mandatory sanctions and penalties upon conviction in the case of certain categories of road traffic offences. No such mandatory penalties have been prescribed in the case of sexual assault (along with a significant majority of other offences coming before the District Court), so that in those circumstances the District Court's power at common law to accept a charitable donation from an accused *in lieu* of a formal conviction continue in principle to hold full sway.

The failure to grant an adjournment

23. The applicant further contends that the District Judge wrongly failed to grant his solicitor an adjournment so that she could properly consider the recent case-law on this topic. This arose in circumstances where the respondent had acceded on the same day to a similar request to allow a different accused to make a donation to charity in respect of a speeding offence. The respondent explained that he had previously indicated in an earlier occasion when that other accused had come before him that he would take such a course but that he had since become aware of (unspecified) High Court authority which precluded him from taking this course of action in any future cases, including the case of the applicant.

24. I agree that it would have better had the respondent agreed to permit a short adjournment for this purpose, not least given that a difficult point of law had now unexpectedly arisen. Yet I cannot think that the applicant was seriously prejudiced in the circumstances by the refusal to grant the adjournment.

25. As counsel for the notice party, Ms. Buckley, pointed out, the applicant had in any event pleaded guilty to the offence, so the only issue related to the actual imposition of a penalty. The fine which was imposed - €60 - was relatively modest and the imposition of the penalty points was, as I have found, also mandatory by law. The present case cannot therefore realistically be compared with cases such as *O'Callaghan v. Clifford* [1993] 3 IR 603 and *Stephens v. Connellan* [2002] 4 IR 321 as these were both cases where the refusal by the District Judges in question to adjourn was, in fact, seriously prejudicial to the accused in those cases.

Conclusions

26. In summary, therefore, I have concluded that:

- i. Despite its obscure and uncertain origins, the existence of the poor box jurisdiction is of such long standing and is so widespread and inveterate, that it must be considered now to be part of the common law which was adopted by Article 50.1 following the coming into force of the Constitution on 29th December, 1937.
- ii. In the case of those traffic offences where the imposition of penalty points has been made mandatory by the Oireachtas via the enactment of the Road Traffic Act 2002, and where the Probation of Offenders Act 1907 has been disapplied to such offences by s. 55 of the Road Traffic Act 2010, the District Court's common law poor box jurisdiction must be taken to have been superseded by these statutory provisions. In such cases it must accordingly be concluded that the District Court enjoys no jurisdiction to impose an informal sanction short of actual conviction such as accepting a donation to the poor box, as this would amount to an indirect circumvention of these statutory provisions.

27. For these reasons I find myself compelled to refuse the relief sought by the applicant.