Neutral Citation Number: [2009] IEHC 14

THE HIGH COURT

2006 1221 JR

BETWEEN

KEVIN TRACEY

APPLICANT

AND

DISTRICT JUDGE MIRIAM MALONE AND DISTRICT JUDGE BRIDGET REILLY

RESPONDENTS

AND

KEVIN GROGAN, RONAN COFFEY AND THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTIES

JUDGMENT of Mr. Justice Cooke delivered the 20th day of January, 2009.

1. On 25th September, 2006, the applicant appeared before the first named respondent sitting at Richmond Courts in the Dublin Metropolitan District to answer twelve summonses with which he had been served, alleging a series of offences under the Road Traffic Acts. On that occasion as on subsequent occasions and in the present proceeding, the applicant appeared in person without professional representation.

2. The applicant informed the first named respondent that he had a number of preliminary issues which he wished to raise prior to the court proceeding with the substantive trial of the offences in the summonses. The applicant, as appears hereafter, raises a number of complaints as to the conduct of the hearing on 25th September, 2006, but it is clear from the affidavit evidence before the court that the only formal order made by the first named respondent on that day was to fix the 12th October, 2006, as a date for the hearing of the preliminary issues and 20th October, 2006, as the date to which the summonses were adjourned for trial. One summons was withdrawn by the prosecution on the latter date. (A further summons may since have been withdrawn but it is not clear which, or when it was withdrawn.) The first named respondent also invited the applicant to lodge in court and furnish to the prosecution written submissions on the preliminary issues by 2nd October, 2006, and asked the latter to provide a submission in response by 8th October, 2006.

3. On 12th October, 2006, the applicant appeared before the second named respondent sitting at Richmond Courts. On this occasion he first applied for an adjournment on the ground that he had been occupied in other courts dealing with other cases every day since receiving the Director of Public Prosecutions submission and had not had time to prepare.

4. The applicant again raises a number of complaints as to the conduct of the four hour hearing before the second named respondent on that day but, once more, it is clear from the evidence that the formal outcome of the hearing was an adjournment of the outstanding "preliminary issues" to 20th October, 2006, the day already fixed for the trial of the summonses.

5. Shortly before that hearing, on 16th October, 2006, the applicant applied *ex-parte* to this Court (Peart J.) and obtained leave to apply, on notice, for relief by way of *certiorari* to quash the "rulings or orders" claimed to have been made by the respondents respectively at the hearings on 26th September, and 12th October, 2006, together with an order staying the District Court proceedings. By orders of 19th October and 6th November, 2006, leave to seek the reliefs which are the subject of this judgment was granted.

6. In these circumstances, the main reliefs now sought and upon which the court is required to rule can be summarised as follows. The applicant seeks:-

(i) An order of *certiorari* quashing a number of "rulings or orders" which are claimed to have been made by the respondents in the course of the hearings on 25th September, and 12th October, 2006. These alleged rulings, orders and other complaints of error are identified in a list set out at subparas. (a) to (p) of section (d), para.1 of the Statement of Grounds.

(ii) An order by way of injunction staying the pending proceedings before the District Court.

(iii) An order of *mandamus* requiring the District Court to:

- provide the applicant with a true copy of the declaration of service of the summonses:

- hear sworn evidence of each charge prior to making a decision on jurisdiction: and

- to allow the applicant a full hearing on the "preliminary issues" on a separate date in advance of the trial of the alleged offences.

(iv) An order of *mandamus* directing the Director of Public Prosecutions not to maintain or become a party to any prosecution which has not been commenced "as a result of an official recommendation or direction from his (the

Director's) office".

(v) A recommendation that the Attorney General's scheme for legal costs be applied to assist the applicant.

7. In the course of the hearing in this proceeding, the applicant sought to extend the relief claimed by including an order quashing the summonses pending before the District Court. This application was refused by this Court upon the ground that no leave to seek any such relief had been granted. It is to be noted in this regard that by order of 3rd December, 2007, (O'Neill J.) the court had already refused an application by the applicant to extend the reliefs for which leave had been granted a year earlier.

8. All of the reliefs claimed are opposed by the third named notice party, the Director of Public Prosecutions ("DPP"). The first and second named notice parties are the members of an Garda Síochána who applied for the summonses. They are not separately represented in this proceeding.

9. As will appear from their individual examination below, all of the "rulings, orders" and other alleged causes of complaint identified by the applicant arise out of the exchanges between the applicant and the respondents respectively at the hearings before them on 25th September, 2006, and 12th October, 2006. Although these hearings never reached the stage at which the formal trial of the offences commenced, the applicant appeared on foot of the summonses and, at the hearing before the first named respondent, he pleaded not guilty when required to plead, a matter which is itself a subject of complaint by the applicant.

10. There is thus a criminal proceeding which has opened before the District Court in which the second named respondent has entertained some four hours of submissions on the "preliminary issues" from the applicant and from the Director of Public Prosecutions in reply, and that proceeding stands adjourned on foot of the stay granted by this Court pending the outcome of the present proceeding or further order.

11. It is a well established principle of the exercise of the court's discretion in the grant of relief by way of judicial review, that the court should be slow to intervene in a criminal proceeding which is underway in an inferior court especially where the alleged irregularities sought to be controlled are capable of being decided by the trial judge in the course of the trial and if necessary upon an appeal. In his judgment on appeal in the Supreme Court, in *Director of Public Prosecutions v. Special Criminal Court* [1999] 1 I.R. 60, O'Flaherty J. endorsed "everything that Carney J. said about the undesirability of people repairing to the High Court for judicial review in relation to criminal trials at any stage (and certainly not during their currency)…" and cited with approval a dictum of O'Dalaigh C. J. in *The People (Attorney General) v. McGlynn* [1967] I.R. 232 at 239:-

> "The nature of a criminal trial by jury is that, once it starts, it continues right through until discharge or the verdict. It has the continuity of a play. It is something unknown to the criminal law for a jury to be recessed in the middle of a trial for months on end and it would require clear words to authorise such an unusual alteration in the course of a criminal trial by jury"

12. O'Flaherty J. then added, "While this statement applies to criminal trials with a jury, it should be regarded as a precept that should as far as practicable, be followed in respect of all criminal trials subject to the jurisdiction of the courts to grant cases stated on occasion".

13. It is only in exceptional cases, therefore, that the High Court should intervene by way of *certiorari* or other relief in a criminal trial before a lower court. Although the proceeding before the second named respondent was at a stage of "preliminary issues" and the remainder of those issues was apparently to be dealt with on 20th October, 2006, before the substantive trial of the offences was to commence, the court considers that this precept remains equally applicable. As all of the grievances raised in those issues by the applicant were matters upon which the trial judge would be entitled to rule whether as matters of preliminary objection as to jurisdiction, or as matters of defence in the course of the trial, this Court will reject the present application in its entirety by refusing, in the exercise of its discretion, to intervene at this stage in application of that precept.

14. However, in order to avoid further unnecessary argument and delay in the resumed trial of the offences in the District Court, the Court will examine individually the various complaints set out in the list at para. d) 1 of the Statement of Grounds as it is clear that they are in any event unfounded.

15. The first general grievance of the applicant is that the respondents refused or at least frustrated his request to be allowed a stenographer at the hearing on 12th October, 2006. This forms the basis on a number of the headings in the Statement of Grounds as follows:-

> "c) respondents refused applicant's application to use the services of a contracted stenographer on 25th September, 2006, and 12th October, 2006:
>
> d) unfairly frustrated applicant's efforts to raise each of the preliminary issues in the court as Malone J. stated that the District Court was not a court of record as no stenographer was present:
>
> k) Reilly J. refused me the use of a stenographer on the 12th October, 2006.
>
> l) Reilly J. demanded that I return to the court at 2.30pm that day with the case law for *R.D. v. McGuinness*, proof of the identity of my McKenzie friend and a copy of the registration certificate of the stenographer.
>
> m) Reilly J. summonsed the owner of the stenographer company into the witness box and requested the qualifications and identification of the stenographer who will be recording this case."

16. At the hearing of the present application the court expressed the view that the applicant did not need any permission

from the District Judge to be accompanied at a case heard in open court by a person to take notes on his behalf whether that person was a professional stenographer retained at his own expense or a gifted amateur able to provide a verbatim note. Subject only to the general entitlement and duty of the judge to ensure the orderly, fair and efficient conduct of the proceedings, no permission of the court was required. Counsel for the Director of Public Prosecutions concurred in this proposition.

17. The court also pointed out that there was, on the evidence, no dispute on this issue and no evidence of any refusal of the alleged request by the respondents, both of whom expressly confirmed that the applicant was free to retain a stenographer if he wished, as the applicant himself concedes at para.10 of his affidavit of 16th October, 2006, where, after describing the exchanges with the first named respondent on the issue at the hearing, he states "The judge then confirmed that there was no issue with the use of a stenographer."

18. In that affidavit, which grounded the application that was made *ex-parte* to the court on 19th October, 2006, the applicant swears at para.19 that, before the second named respondent on 12th October, 2006, "I attempted to make a further application to the court for the use of a contracted stenographer. Reilly J. said "No, I'm refusing it." That evidence does not represent the full truth because when the applicant's account of the proceedings on that occasion was challenged in the replying affidavits on behalf of the Director of Public Prosecutions and after this Court had granted leave, the applicant concedes at para. 7 of his affidavit of 16th April, 2007, that " It is true to say that the second named respondent stated that the matter with regard to the stenographer had no bearing on the matters before her and that the quality of the stenographer and related work was a matter for the applicant."

19. In the light of the foregoing, in the course of the hearing of the present application, the court indicated to the applicant that it would be prepared if necessary to confirm by a declaration to that effect, his entitlement to engage at his own expense and be accompanied by a professional stenographer subject, of course, to the entitlement of the trial judge to ensure that the proceedings are conducted efficiently and are not interrupted or delayed. Counsel for the Director of Public Prosecutions raised no objection to the court's suggestion.

20. The court made that proposal for the sole purpose of avoiding any further argument and delay by reference to this issue on any resumed hearing on the summonses in the District Court before, possibly, a different judge. The declaration thus made should not be construed therefore as implying that the applicant has established any unlawful refusal or obstruction of the applicant in this matter on the part of either of the respondents. Quite the contrary: as found above, neither respondent denied the applicant the entitlement to engage a stenographer. No further issue therefore arises on the complaints identified in the five subparas. listed in para. 15 of this judgement. As a basis for seeking judicial review by way of order of *certiorari* to quash any ruling or order made by either of the respondents, these complaints are thus unfounded in fact.

21. The applicant's second general complaint is that the respondents denied him his claimed right to be assisted by a so-called "McKenzie Friend". (The expression "McKenzie friend" originates in a divorce case before the English courts: *McKenzie v. McKenzie* [1971] p. 33 (see the judgment of Macken J. in *R. D. v. McGuinness* [1999] 2 I.R. 412.) This claim is expressed in the list of grievances at para. (d) 1 in the Statement of Grounds as follows:-

> "j. (The applicant was) quizzed by Reilly J. on the identity and qualifications of my McKenzie friend and later asked to produce evidence of his identity:"
>
> "l. Reilly J. demanded that I return to court at 2.30 pm that day with the case law for *R.D. v. McGuinness*, proof of the identity of my McKenzie friend and a copy of the registration certificate for the stenographer."

22. This issue concerns only the hearing before the second named respondent on 12th October, 2006. Although neither the Statement of Grounds nor the applicant's grounding affidavit of 16th October, 2006, refers expressly to a specific refusal by the respondent to permit the attendance of a McKenzie friend, the fact that there had been such a refusal is the only inference to be drawn from the claim in the Statement of Grounds to have an order of *certiorari* made in respect of a ruling or order to that effect. Once again, however, it is clear that the impression which the applicant sought to give does not correspond to what actually happened. As the applicant again concedes at para. 7 of his affidavit of 16th April, 2007, sworn in response to that of Michael O'Donovan, the solicitor in court on that day on behalf of the prosecution, "I was forbidden a McKenzie friend in the morning sitting of this case. The permission to be allowed a McKenzie friend was not granted until the afternoon (despite that no permission is required)." Accordingly, no ruling or order adverse to the applicant on this issue was in fact made by the second-named respondent. Again, therefore, this claim for relief is unfounded in fact.

23. The next group of complaints concerns the applicant's contention that before he could be obliged to plead to the offences alleged in the summonses, and prior to any decision being taken by the second named respondent to fix a date for their hearing, he was entitled to have presented and to challenge, evidence of the making of the complaints and the issue of the summonses. These contentions form the basis of the reliefs listed in the Statement of Grounds as follows:-

> a. [the respondents] demanded that the applicant plead to charges not properly before the court and over which the court had no jurisdiction:
>
> b. [the respondents] proceeded to fix a trial date without hearing any complaint, information or charge on the alleged matters: and
>
> f. [the respondents] prevented the gardaí named on the summonses … from giving evidence and being cross-examined, such that no sworn evidence of the complaint, charge or issuance of the summonses is as yet before the District Court and the preliminary issues arising therefrom have not been dealt with.

24. As the applicant explained in his submissions to the court, these contentions are based upon the provisions of sections X and XII of the Petty Sessions (Ireland) Act 1851. As such, the claim is clearly misconceived. As appears on the

face of the summonses in question, they were not issued on foot of any sworn information or complaint made under section X of the Act of 1851 but by means of the administrative procedure introduced by s.1 of the Courts (No. 3) Act 1986. In accordance with that section the summonses were applied for by the member of An Garda Síochána named in each summons and issued by the clerk of the District Court to whom the applications were made. The six month time limit prescribed by section X of the 1851 Act continues to apply to the issue of summonses under s. 4 of the 1986 Act but s. 7(a) has the effect of applying that limit to the period between the date upon which the cause of complaint arose and the date of application for issue of the summons under section 4.

25. Ten of the summonses in issue in the proceedings before the District Court are dated 22nd May, 2006, and relate to offences alleged to have been committed on 23rd November, 2005. They recite that they were issued on foot of applications made by the first named Notice Party on 19th May, 2006. Accordingly, as they were on their face applied for and issued within six months of the date occurrence of the alleged offences they fulfill the requirements of the 1986 Act. Similarly, the remaining summons which alleges offences committed on 23rd June, 2005, is dated 12th April, 2006, and recites that it was applied for on 15th December, 2005, so that, on its face, it too was applied for within six months of the date of the offence alleged.

26. It follows accordingly that the summonses in question were properly before the District Court on 25th September, 2006. Moreover, any procedural defect in the issue or service of the summonses in question was cured by the applicant's appearance on that day to answer them. (See the dictum to that effect in the judgment of Henchy J. in *Director of Public Prosecutions v. Clein* [1983] I.L.R.M. 76.)

27. As a result, the applicant's grievances under these headings are misconceived and unfounded. No basis exists for the contention that the respondents had no jurisdiction to proceed to deal with the matters before the court on either date or to do so without first requiring evidence to be given of the laying of information or the making of a complaint and without allowing the applicant to cross-examine such evidence.

28. The next more general complaint made by the applicant is that he was denied a fair hearing before the second named respondent because there was undue haste in proceeding to the trial of the summonses and an inadequate and separate hearing of the applicant's "preliminary issues". This complaint is expressed in the Statement of Grounds as follows:

> "(e) Malone J. had reserved a date for the hearing of the application's preliminary issues but Reilly J. insisted that the hearing of the preliminary issues be held before the commencement of the trial on the same day:
>
> (n) [The second named respondent] proceeded with such undue haste that the applicant had no time to follow what was happening or to make application for a "Gary Doyle" order:
>
> (o) [The second-named respondent] set the matter for hearing on 20th October, 2006: and
>
> (p) in general denied the applicant's right to a fair hearing and due process under law … on 25th September, and 20th October, 2006."

29. In respect to these complaints three points must immediately be made. First, on 12th October, 2006, the second-named respondent heard the applicant in his submissions on the preliminary issues over a period of four hours, a period which appears to have been largely devoted to the questions of the stenographer and the McKenzie friend. This does not imply any degree of haste. Secondly, as already pointed out above, the outcome of the debate on those two questions was in the applicant's favour: he succeeded in obtaining the approvals he sought. Thirdly, the second-named respondent did not, as the applicant seeks to imply, refuse to deal with any further "preliminary issues" but, understandably, after a full day in court, adjourned the matter to the day already reserved for the hearing of the summonses, 20th October, 2006, with the express intention of dealing with the outstanding issues prior to the substantive trial of the offences.

30. In these circumstances, this Court finds that there cannot be said to have been any undue haste or unfairness in the manner in which the second-named respondent dealt with the matters before her on 12th October, 2006. The applicant was in fact heard on the issues he raised in the time available to the court on the separate day which the applicant had requested. In the light of the applicant's insistence that he had further preliminary issues to raise it is clear that the second-named respondent had no option but to adjourn to a later date. The fact that the remaining issues were adjourned to 20th October, 2006, does not of itself connote any undue haste or unfairness in the procedure. It is entirely a matter for the trial judge to manage the dispatch of the business before the court, including the choice of dates, subject only to the overriding responsibility to ensure that the proceedings are conducted fairly. This Court must therefore proceed on the basis that that responsibility will be discharged on the resumed hearing of the proceeding in the District Court – an assumption which can readily be made in this instance in view of the manifest fairness and latitude extended to the applicant already on 25th September, and 12th October, 2006, by the respondents respectively. It cannot therefore be deduced from the fact that consideration of the outstanding preliminary issues was adjourned to 20th October, 2006, that any resumed hearing will necessarily entail unfairness or infringement of the rights of the applicant.

31. Three further matters are raised in the list of grievances at section (d) para.1 of the Statement of Grounds as follows:

> "(g) refused (sic) to give the name of the representative from the D.P.P.'s office in court on 25th September, 2006:
>
> (h) On 12th October, 2006, Reilly J. demanded and intimidated the applicant into taking his place in the witness box as she said he was the accused in the case, even though this court date was fixed on 25th September, 2006, for the hearing of the preliminary issues: and
>
> (i) threatened by Reilly J. that if I did not enter the witness box I would be removed from the court…"

32. In spite of the way in which item (g) is expressed in the Statement of Grounds, it is clear from para.13 of the

applicant's grounding affidavit of 16th October, 2006, that this complaint is not addressed to the second-named respondent but is directed at Michael O'Donovan, solicitor, who represented the prosecution in court on 12th October, 2006. It is he who was asked for his name by the applicant. In that circumstance the claim for relief by way of *certiorari* is manifestly misdirected and unfounded.

33. Even if it is assumed that the matters alleged at items (h) and (i) could be characterised as a direction given by the second-named respondent so as to be amenable in theory to being quashed, which this Court considers highly doubtful, it is clear that no purpose whatsoever would be served by such an intervention given that the direction had no material bearing on the hearing and that it is in any event spent.

34. It follows from all of the foregoing that the claims for relief in the form of an order of *certiorari* as set out at section (d) para. 1 of the Statement of Grounds are unfounded and must be refused.

35. The applicant was also given leave to seek an order of *mandamus* (see para. 6 of this judgment,) directing the District Court as follows:

a. to provide the applicant with a true copy of the declaration of service of the summonses:

b. to hear sworn evidence of each charge prior to making any decision relating to jurisdiction: and

c. to allow the applicant a proper and full hearing of the preliminary issues arising well in advance of any trial date.

36. This claim will also be refused for the reasons already given above in respect of the corresponding claims for relief by way of *certiorari*. As found in paras. 23 to 27 above, no issue has been shown to exist in relation to the service of the summonses in question. On the contrary, the applicant's own sworn testimony in the present proceeding is that he was served with two of the summonses by post on 2nd June, 2006, and that the other ten were served on him personally on 23rd June, 2006. (Para. 3 of the affidavit of 16th October, 2006.) Secondly, the claim of entitlement to sworn evidence of the charges has similarly been found to be misconceived. Thirdly, as found at para. 30 above no infringement of the applicant's right to a fair hearing has been established by reference to the manner in which the "preliminary issues" had been dealt with on 12th October, 2006, or were proposed to be dealt with on a resumed hearing.

37. Finally, the court will also reject the claims for an order directed to the Director of Public Prosecutions in the terms of para. 4 of s.(d) of the Statement of Grounds and at para. 5 for a recommendation in relation to the Attorney General's legal costs scheme. The former claim is misconceived, beyond the competence of the court and has nothing to do with the only matter in which the applicant has an interest for the purpose of the present proceeding, namely, the outstanding summonses in the District Court. The latter relief is something to which the applicant has no legal entitlement.

38. Accordingly, the only order that will be made upon this application is that agreed to be made for the sole purpose explained at para. 20 of this judgement, namely, a declaration confirming the entitlement of the applicant to retain a professional stenographer at the resumed trial of the summonses, at his own expense and subject to the entitlement of the trial judge to ensure that no interruption or delay is thereby caused in the conduct of the proceeding. In all other respects the claims are dismissed.