APPROVED [2023] IEHC 550

THE HIGH COURT

[2022 No. 176 JR]

BETWEEN:

RONAN CORRIGAN

APPLICANT

-AND-

THE DISTRICT COURT FOR THE COUNTY OF DUBLIN AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice Barry O'Donnell delivered on the 13th day of October, 2023

INTRODUCTION

1. This judgment concerns an application for relief by way of judicial review arising from criminal proceedings in the District Court. The main issues concern the question of whether a District Judge was entitled to reverse an initial spoken decision striking out a criminal charge, reinstate that charge, and then adjourn the matter for a fresh hearing. The applicant argued that the District Judge did not have jurisdiction to make the impugned decisions, or alternatively that the decision to reinstate the charge was flawed because the reasons given for the decision were not sufficient to ground the proper exercise of the jurisdiction.

2. For the reasons set out in this judgment, I am satisfied that as a matter of principle the District Judge had jurisdiction to reinstate the charge that he struck out, but, while this is close

to a borderline situation, the way the jurisdiction was exercised was flawed to the extent that the applicant is entitled to relief.

THE RELIEF CLAIMED

3. The applicant seeks the following primary relief by way of judicial review: -

"(i) An order of certiorari by way of an application for Judicial Review quashing the order made by a District Judge sitting in Dún Laoghaire District Court on the 9th February 2022, which order vacated his earlier order of the same day, dismissing a charge against the Applicant of an offence pursuant to section 38 of the Road Traffic Act, 1961, as amended, and as set out in Charge Sheet 218980099, and which further order adjourned the said charge against the applicant for a de novo hearing, and,

…

(iii) Further, and if necessary, a Declaration by way of an application for Judicial Review that no lawful and/or valid charge subsists against the Applicant for an offence pursuant to section 38 of the Road Traffic Act, 1961, as amended and as set out in charge sheet 218980099."

THE EVIDENCE

4. On 9 February 2022, the applicant was before Dún Laoghaire District Court in connection with his prosecution in respect of two charges. The first charge was for driving without a driving licence in contravention of section 38(1) of the Road Traffic Act 1961, as amended. The second charge was for driving without insurance, in contravention of section 56 of the Road Traffic Act 1961, as amended. The applicant pleaded not guilty to both charges.

5. Both charges were dealt with in the same hearing before the District Judge. The prosecuting Garda gave the following evidence. On 26 January 2021, he stopped the applicant

driving his vehicle in Dún Laoghaire. The applicant had no driving licence on his person, but he stated it was in his house. A demand was made of him to produce his driving licence and certificate of insurance or exemption; he undertook to produce them at Ballyfermot Garda Station but failed to do so. In addition, the Garda gave evidence that he had ascertained that the applicant was serving a disqualification from driving during the period in which he was stopped. The prosecuting Garda produced an email that he stated had been obtained from the Road Safety Authority ("the RSA"), which it was stated supported his contention that the applicant was disqualified from driving at the relevant time. The prosecuting Garda also gave evidence in relation to a demand for the production of a certificate of insurance and that no certificate of insurance had been produced.

6. Following the evidence in chief of the prosecuting Garda, the applicant's counsel cross examined the Garda in relation to the RSA document. Following cross-examination, the applicant made an application that there was "no case to answer". That application was based on the assertion that the email from the RSA constituted inadmissible hearsay and that in the premises there was insufficient evidence to support the charges. The District Judge held that there was an issue as to when the disqualification period had commenced. Where the prosecution was relying on the contents of an email from the RSA, the District Judge stated that somebody from the RSA ought to have attended to present evidence to give direct evidence and to clarify the situation. In those circumstances, the District Judge deemed that a reasonable doubt had been raised, and he stated that he would accede to the defence application in relation to the s. 38(1) driving licence charge. However, the District Judge was satisfied that there was a case to answer in relation to the s. 56 no insurance charge.

7. The applicant then commenced giving evidence in respect of the second charge. During examination in chief, he stated that he had insurance at the relevant time but had not brought any of the relevant documents with him. At that point, the District Judge decided to adjourn

the s. 56 matter. This appears to have been on the basis that there was little point in proceeding if the issues could be clarified by allowing the applicant to retrieve the relevant documents. In response to that development, the prosecuting Garda inquired if the s. 38 matter might also be reinstated and adjourned. Despite objections from the applicant, the District Judge stated that he would also reinstate the s. 38(1) charge and adjourned both matters for a *de novo* hearing at a future date and indicated that he was not retaining *seisen*.

THE APPLICATION FOR JUDICIAL REVIEW

8. Leave to apply for judicial review was granted by the High Court on the 7 March 2022. The arguments made in the statement grounding the application for leave to apply for judicial review can be reduced to four core matters: -

(a) Having decided that the s. 38(1) charge should be dismissed on the basis that there was no case to answer – which is contended to be a decision on the merits – the District Judge had no jurisdiction to vacate his order or to reinstate the charge against the applicant.

(b) The District Judge had no jurisdiction to reinstate the said charge against the applicant where no basis or reason for doing so was advanced on behalf of the prosecution which related to either the substance of that charge or to any procedural matter relating to the earlier hearing and disposal of that charge. In effect, the District Judge lacked jurisdiction to reinstate the s. 38 charge simply on the basis that a separate charge against the applicant was being adjourned.

(c) For the District Judge to make an order reinstating a charge following its dismissal on the merits was contrary to the principle of *autrefois acquit* and not in accordance with law or fair procedures.

(d) Relatedly, to permit the prosecution to remedy their evidence after they had closed their case and after the charge had been dismissed was a breach of the applicant's fair trial rights under the Constitution.

THE POSITION OF THE RESPONDENTS

9. The respondents make a number of points in the statement of opposition. First, it is asserted that by reference to s. 38 (1) (a) of the Road Traffic Act 1961, as amended, in a prosecution for driving without a licence there is a presumption, unless the contrary is shown by the accused, that he did not hold a driving licence at the time he drove the vehicle. Flowing from that presumption, the respondents assert that the Garda's evidence that he had made a lawful demand of the applicant to produce his driving licence was sufficient to make out a *prima facie* case and the issue of whether or not the applicant was disqualified from driving and hence the admissibility of the email from the Road Safety Authority did not amount to a necessary prosecution of proof. The argument being, in other words, that independent of the status of the RSA document, the District Judge had erred in agreeing to dismiss the first charge.

10. Second, the respondents suggest that the District Judge placed undue focus on the RSA document and, so it is asserted, incorrectly deemed that a reasonable doubt had been raised in relation to the driving licence charge.

11. Third, when it became apparent that the applicant was stating that he would be able to get a copy of his insurance, the District Judge then indicated that there was no point in proceeding further with the case and that the matter would go back for the production of documents. The argument was made that the District Judge acted fairly towards the applicant in adjourning the insurance charge. The driving licence prosecution remained "in the breast of the court" because no formal order had been drawn up, and therefore it was open to the District

Judge to reinstate the driving licence prosecution and to adjourn both charges for hearing together on another date.

12. In that regard, the respondents relied on a line of jurisprudence that they assert confirms the jurisdiction of District Judges to alter their mind after making orders in appropriate circumstances; and, as such, it was open to and *intra vires* the presiding District Judge to vacate his earlier order and to adjourn the proceedings.

13. Fourth, the respondents generally deny that the District Judge exceeded his jurisdiction, or that the District Judge acted contrary to the principle of *autrefois aquit* or that he acted unfairly. They assert that there was no want of fair procedures or any breach of the applicant's right to a fair trial, and, as put in para. 19 of the statement of opposition: -

> "*The reinstatement of the no driving licence prosecution simply restored the status quo ante in relation to that charge. Whereas it has not precluded the applicant from making any appropriate application that he deems fit to make, it has remedied and removed any potential for a prosecution appeal by way of case stated, arising from the original vacated decision*".

PRELIMINARY POINTS OF DISPUTE

14. In the written submissions made on behalf of the applicant, issue was taken with the evidence adduced on behalf of the respondents. It was said that the factual description of matters in the statement of opposition went further than the factual matters set out in the affidavits filed on behalf of the respondents. In addition, it was asserted that there were factual inaccuracies in the statement of opposition. At the hearing of this application, those points were not pressed by counsel strongly for the applicant, whose position was that the case could be disposed of on the uncontroverted evidence.

15. In response, the respondents in their written submissions highlight first that the prosecuting Garda verified the statement of opposition and the facts set out in that statement in his verifying affidavit. The fact that the deponent on behalf of the respondents – who is the prosecuting Garda in the case – did not rehearse in his affidavit each and every fact asserted in the statement of opposition did not take from the validity of his verification. Second, the point was made that if the applicant took issue with the evidence adduced on behalf of the respondents it was a matter for the applicant to seek to take steps to resolve any potential conflict.

16. Subject to matters referred to below, I do not consider that the preliminary points made by the applicant are correct. In the grounding affidavit on behalf of the respondents, the deponent expressly stated that he verified the facts set out in the statement of opposition. I do not consider that the deponent was required to rehearse each of those facts in the affidavit. In relation to the contention that the respondents were incorrect in their description of the facts, I note that the applicant's affidavit was sworn on 3 March 2022 and the opposition papers including the verifying affidavit of the prosecuting Garda were finalised by 5 November 2022. If the applicant considered that the respondent's evidence was incorrect or required to be challenged, he had ample opportunity to seek to file a replying affidavit in which he sought to contradict any facts set out in the opposition papers, and thereafter to take whatever procedural steps may be required to assist in the resolution of that conflict. That was not done. I am therefore happy to proceed on the basis of the papers before me, in which the evidence, while differing in its emphasis, does not, as I read it, give rise to any obvious conflicts on the material facts.

17. There is one caveat to that position. At para. 4 of his affidavit, the prosecuting Garda refers to the intention behind his reference to the RSA document, and there is an assertion that the applicant renewed his driving licence subsequent to him being stopped by the prosecuting

Garda because he later produced his driving licence for a separate incident. These points do not appear to have been articulated or raised with the District Judge at the time of the prosecution, and I consider that they are irrelevant to what has to be decided.

THE RESPONDENTS' CONTENTION THAT THE DISTRICT JUDGE ERRED

18. A significant point of emphasis in the respondent's case, expressed in the statement of opposition and in written and oral submissions, is that the District Judge essentially erred in acceding to the application that the applicant had no case to answer in respect of the driving licence charge. As I understand it, the argument is that the evidence given by the prosecuting Garda in the District Court was sufficient to trigger the statutory presumption contained in s. 38 of the Road Traffic Act 1961, and in those circumstances, the District Judge erred in granting the "no case to answer" application in the first place. In the statement of opposition at para. 19 it is asserted that the subsequent decision of the District Judge to vacate his earlier order and reinstate the s. 38 charge "*has remedied and removed any potential for a prosecution appeal by way of case stated, arising from the original vacated decision*".

19. I am not satisfied that that line of argument is correct in the circumstances of this case. It is clear to me from the papers that the District Judge was not requested to reinstate the s. 38 charge on the basis that he had made an error or failed to have regard to the relevant statutory presumption. Rather, when it became apparent to the prosecuting Garda that the District Judge was proposing to adjourn the s. 56 charge, he then requested, *simpliciter*, that the s. 38 charge be reinstated so that evidence could be obtained from the RSA. This was the only reason given by the Garda for that application.

20. It is important to note that the situation may well be different if the issue on the statutory presumption point had been brought to the attention of the District Court at the relevant time and formed part of the reasons given for reinstating the charge. Here, that did not happen: the

asserted error was not drawn to the attention of the District Judge and was not a reason given for the decision of the Judge. I do not consider that it is open to the respondents to argue that there was another reason why the District Judge could have acceded to the application where the point was not made or argued at that time.

THE BREAST OF THE COURT ISSUE

21. The first substantial point raised by the applicant is the argument that having agreed that the charges should be dismissed on the basis that there is no case to answer, i.e., on the merits, the District Judge had no jurisdiction to vacate his order or to reinstate the charge against the applicant.

22. In that regard, both in their written and oral submissions the applicant placed considerable emphasis on observations made by the Supreme Court in the case of *Richards v. O'Donohoe* [2017] 2 IR 157. In that decision, the first applicant had been convicted in the District Court and appealed to the Circuit Court. The prosecuting Garda was not present in the Circuit Court at first call, and the appeal was allowed. Later that day, in the absence of the applicants, the case was reinstated. In addition to the question of the power of the Circuit Court to reinstate the matter, a significant fair procedures issue arose in respect of the way the decision was made. That related to the position of the second applicant, who was the first applicant's bails-person and who was not on notice of the application to reinstate.

23. The Supreme Court was concerned with the primary question of whether the High Court, having granted certiorari, should have remitted the matter to the Circuit Court. However, in the course of its judgment, the Supreme Court discussed the line of authorities dealing with the jurisdiction of the District or Circuit Court to alter or vacate an order where the matter remains "in the breast of the court". Similar issues had been considered by the Supreme Court

in the earlier case of *Kennelly v. Cronin* [2002] 4 IR 292. In *Kennelly*, at p. 306, Geoghegan J. noted: -

> "All sorts of contingencies happen in a District Court every day of the week. There are many circumstances in which District Court judges reinstate struck out proceedings, rightly or wrongly. The District Court is a court of record and until an order made on a particular day has become the final record of that court, it cannot in all the circumstances be assumed that a spoken order is the final disposal of the proceedings and, thereby in a case such as this, rendering a recognisance a spent force. Perhaps I should more accurately say that this may not necessarily be the effect in all cases of a 'strike out' followed by a reinstatement. I can see no reason to regard the 'in the breast of the court' jurisprudence, referred to in the judgment of McGuinness J. and more fully elaborated on at pp. 202 and 203 of O'Connor's 'The Irish Justice of the Peace' Vol. 1 (2nd Ed.) as outdated or no longer applicable. I am reinforced in that view by the reliance on it by Davitt P. in the *State (Kiernan) v. De Burca* [1963] IR 348 at p. 357".

24. In *Richards,* the Supreme Court made a number of general observations regarding the "breast of the court" jurisdiction. On the basis that they did not arise for consideration in the circumstances of that case, the Supreme Court also identified some areas of ongoing uncertainty. As noted by O'Malley J. at para. 45 of her judgment, that judgment dealt primarily with the situation where what appeared to be a final order was made without any hearing on the merits, because of the inability of one party to proceed at the time the case was called. In the judgment, O'Malley J. noted as a general proposition, at para. 45, that: -

> "The so-called "breast of the court" line of authority is broad enough to encompass cases where a judge wishes to alter an order after hearing both parties on the merits".

25. I consider that the judgment in *Richards* is consistent with the observations of Geoghegan J. in *Kennelly* in the sense that there is no reason to regard the "in the breast of the

court" jurisprudence as either outdated or no longer applicable. The judgments do not appear to seek to alter the basic propositions that (a) because the District Court is a court of record, there is no final order until an order has become a final record of the court; and (b) in those premises, it is open to the relevant judge to amend or vary an order up to the point where a final decision is entered in the court book. Put another way, it cannot in all circumstances be assumed that a spoken order is the final disposal of the proceedings.

26. On the basis of the approach adopted by the Supreme Court in *Kennelly* and in *Richards*, it is clear that the "breast of the court" jurisdiction continues to be available, in the appropriate case. In those premises, I am satisfied that the applicant cannot succeed on his first substantial point, being that the District Judge simply lacked jurisdiction to alter the initial spoken decision.

FAIR PROCEDURES ARGUMENTS

27. However, there are remaining potential questions identified by the Supreme Court in *Richards*. In this case, it is clear that all relevant matters occurred within a short space of time in the context of a single hearing dealing with the two relevant charges. Throughout that period the applicant was represented by solicitor and counsel, and the prosecuting Garda remained present and engaged. Accordingly, for the purposes of this case, it is not necessary to engage with the question of what time can elapse between an initial spoken order and a decision to vary or alter that order. Obviously, there may be other circumstances where the fact that the accused has left the court on the assumption that the case was over could engage issues of procedural fairness if decisions are made subsequently in their absence.

28. It is also not necessary to consider whether at a very high level the operation of the jurisprudence alters where the first order is in favour of the accused rather than the prosecution. In that regard, O'Malley J. noted at para. 50 in *Richards* that, apart from the Scottish case

M'Rory v. Findlay [1911] SC (J) 70, the issue appears only to have arisen where the alteration favours the defence. However, as noted by O'Malley J. in the subsequent paragraph: -

> "Further, I think that considerations of equality, fairness and the interests of justice require that a mechanism for the correction of mistakes or innocent failure to appear be available to the prosecution as well as the defence, on comparable terms. However, I think that it is necessary in either case that the application be made promptly".

29. Of more relevance to this case, O'Malley J. framed two of the questions that did not need to be addressed by the Supreme Court in the following terms: -

> "This case is not concerned with the situation where, having heard evidence and submissions on a substantive matter and made an order, a judge simply changes his or her mind during the course of the day. In such cases, the jurisdiction to alter a decision during the sitting of the court must be regarded as circumscribed by the requirements of fair procedures and rationality. There may well also be separate considerations applicable to a case where there has been an acquittal after a hearing on the merits. However, those issues do not require to be determined in these proceedings".

30. Hence, while the "breast of the court" jurisdiction continues to exist, and without having to consider the position where there is a decision on the merits, the decision at a minimum must be made in a fair and rational manner. In these proceedings, the question therefore is whether the decision was fair and whether the reasons for the decision are reasonably connected to a proper purpose.

31. I am acutely conscious that the District Court has to deal with a considerable volume of applications in any particular sitting, and that in most cases the District Court cannot be expected to produce extensive reasoned decisions. Likewise, the Court understands that prosecuting Gardaí may not be alive to every potential point that can arise in cases. There is an obvious merit in the flexibility afforded by the "breast of the court" jurisdiction to address

errors or mistakes. However, in this case I consider that there were sufficient flaws in the process to warrant granting relief to the applicant.

32. In my view, while the hearing before the District Court was relatively short, it amounted to a hearing on the merits of the driving licence charge. While the overall process arose from one initial stop by the Garda, and was dealt with in one sitting, the reality is that there were two distinct and independent charges that had to be dealt with. The prosecuting Garda gave his evidence, he was cross-examined by counsel on behalf of the applicant, and when he concluded his evidence, counsel for the applicant made an application to have the charges dismissed on the basis that there was no case to answer. The District Judge then decided to strike out the driving licence charge. Whether that initial decision was correct, warranted, or within jurisdiction is not, in my view, strictly relevant to these proceedings. This is because the correctness of the decision was not raised as a reason why the charge should be reinstated. What matters is how the District Judge decided to reinstate the charge.

33. The second point raised by the applicant is that if the District Judge had jurisdiction to vacate his order or reinstate the charge against the applicant, he exceeded his jurisdiction where no basis or reason for doing so was advanced on behalf of the prosecutor which related either to the substance of that charge or to any procedural matter relating to the earlier hearing and disposal of that charge. Put another way, the happenstance that the second charge was going to be adjourned to allow the applicant to retrieve and produce evidence that he was insured at the relevant time is not a sufficient reason to justify vacating the earlier order and reinstating the driving licence charge. As noted by O'Malley J. in *Richards* at para. 44: -

> "The exercise of a judicial discretion in making a decision of this nature [a decision to reinstate a matter] requires an explanation, however brief, so that parties have a proper appreciation of the circumstances".

34. I am not satisfied that the mere fact that the second charge was to be adjourned in and of itself is a sufficient explanation or reason for reinstating the first charge. The District Judge had decided following a hearing and submissions that the first charge was to be dismissed. At the point where the adjournment decision was made in relation to the second charge, the evidence given by the applicant had been interrupted, and before making any final decision on the merits of the second charge, the District Judge had made a pragmatic decision permitting the accused some time to retrieve any insurance information or documentation that he wished to rely upon was the proper course of action.

35. I consider it important to emphasise that this was not a case or a situation whether either the District Judge or the prosecution considered it necessary to reinstate the driving licence charge because of an error that had been made in the course of the proceedings by the District Judge. This was a point made by the respondents in these proceedings, but it was not an issue that arose in the District Court proceedings. It appears to amount to some form of post – hoc rationalisation for the decision of the District Judge.

36. As I understand it, the primary focus of the Supreme Court in *Richards,* was not on the continued existence of the "breast of the court" jurisdiction but rather on the need for the jurisdiction to be exercised in a fair and rational manner. As noted above, in considering this application, I am acutely conscious of the fact that the District Court operates to an extremely busy schedule and is required to dispose of a considerable amount of work under difficult time constraints. Nevertheless, in the specific circumstances of this case, I am not satisfied that the manner in which the District Judge sought to exercise his jurisdiction to vacate his earlier order and reinstate the driving licence charge was fair. The case in relation to that charge had concluded, the decision had been made, and the reason given by the District Judge – to permit the prosecuting Garda to obtain evidence from the RSA – does not appear to have been motivated by any concern about the integrity of the hearing or the correctness of the decision

that had been made in relation to the first charge. Instead, the reason was that the accused was to be given time to produce evidence that he was insured, where no substantive decision had been made on the merits of that second charge.

37. On one level, the decision of the District Judge to reinstate the first charge could be treated as fair in the sense that it allowed both sides an opportunity to mend their hands or get their proofs in order. Here, the difficulty is that there had only been a concluded hearing on the merits of the first charge, and the hearing on the second charge was not concluded. As I understand the dicta in Richards, the concept of fairness requires not just that there is some brief explanation of the reasons to exercise the "breast of the court" jurisdiction, but that the reason given is connected to a proper purpose.

CONCLUSION

38. In the premises, I am satisfied to grant relief to the applicant. As it does not appear that any formal order was drawn up in the District Court, I consider that there is no need to grant an order of certiorari. However, I propose to grant a declaration that no valid charge subsists against the applicant for an offence pursuant to s.38 of the Road Traffic Act 1961, as amended, as set out in Charge Sheet 218980099.

39. As this judgment is being delivered electronically, my provisional view is that because the applicant has been successful in this application, he should be entitled to recover his costs against the second respondent. However, in case the parties wish to contend for a different form of order than the orders proposed, I will list this matter before me for a final hearing at 10.45 am on Friday the 27 October 2023.