THE HIGH COURT

[2024] IEHC 545

[Record No. 2021/493JR]

BETWEEN

AG

APPLICANT

AND

A JUDGE OF THE DISTRICT COURT

RESPONDENT

AND (BY ORDER) THE DIRECTOR OF PUBLIC PROSECUTIONS,

PAUL DOLAN, CRAIG GEOGHEGAN, EOIN KELLY AND

JOHN PAUL COCHIN

NOTICE PARTIES

JUDGMENT of Mr Justice Barr delivered on the 16th day of September 2024.

Introduction.

1. This is a challenge to the ruling made by a judge of the District Court on 10 March 2021, refusing the applicant's application for the issuance of summonses against four gardaí, alleging that they had committed crimes of assault and false imprisonment against him.

2. The applicant made the application as a common informer pursuant to s.10(4) of the Petty Sessions (Ireland) Act 1851, as amended.

3. At the time of his application, the applicant was facing charges at the suit of the gardaí for alleged breaches of the Criminal Justice (Public Order) Act 1994, arising out of an incident in the carpark of a shopping centre on 25 August 2019. The gardaí against whom the applicant proposed to issue summonses, were gardaí who had had an involvement in his arrest and detention on 25 August 2019.

4. In summary, the District Court judge refused the applicant's application on grounds that the application was premature and because he considered it to be a procedural abuse of process. In these proceedings, the applicant challenges the legality of that ruling.

Background.

5. In setting out the background to this application, this Court must be careful in what it says, as there are criminal proceedings against the applicant extant before the District Court. As the court is anxious not to prejudice that trial, it will confine itself to referring to the events giving rise to the charges against the applicant, in the briefest possible terms.

6. It is common case that the applicant's child, who was then approximately two years and ten months old, was left unattended by the applicant in his car in the carpark of Liffey Valley Shopping Centre on 25 August 2019.

7. It appears that a lady, who was in the carpark, became concerned about the safety of the child in the car. She phoned the security personnel in the shopping centre. They, in turn, notified the gardaí, who arrived some short time later. The charges which the applicant is facing in the District Court prosecution, arise out of his

interaction with the gardaí, when he returned to the car with a shopping trolley containing some items and containing his older son, who was approximately four years and seven months at that time.

8. Arising out of the interaction between the applicant and the gardaí in the carpark, the applicant was arrested and was charged with a number of offences under the Criminal Justice (Public Order) Act 1994, as amended (hereinafter "the 1994 Act"). In particular, he is charged with the offence, that having been directed by a member of An Garda Síochána to desist from acting in a manner contrary to the provisions of s.6 of the 1994 Act, he failed, without having any lawful authority or reasonable excuse, to comply with the direction given by the garda, and thereby committed an offence contrary to s.8 of the 1994 Act, as amended.

9. The applicant is also charged with having failed to give his name and address following a demand therefore, as made by the garda under s.24(2) of the 1994 Act, thereby committing an offence under sub-s 24(3) and (4) of the 1994 Act, as amended. Finally, the applicant is charged with having used or engaged in threatening, abusive or insulting words or behaviour, with the intent to provoke a breach of the peace, or being reckless as to whether a breach of the peace might have been occasioned, contrary to s.6 of the 1994 Act, as amended.

10. The applicant feels very aggrieved about how he was treated by the gardaí on the day in question. He believes that the gardaí lacked legal authority to demand that he give his name and address; that they used excessive force in effecting his arrest; that they consciously assaulted him by placing the handcuffs too tightly around his wrists; and did not loosen them when requested to do so; and finally, that in placing him in the garda van and by detaining him at the garda station, they had falsely imprisoned him.

11. On 10 March 2021, the applicant swore an information before the District Court judge setting out his statement of what he alleged had happened to him on 25 August 2019 and setting out the crimes which he alleged had been committed by the gardaí, in respect of which he wished to issue summonses. He exhibited drafts of the summonses that he wanted to issue.

The Ruling of the District Court Judge.

12. Having heard oral submissions from the applicant requesting that summonses should issue against the second, third, fourth and fifth named notice parties, the learned District Court judge gave his ruling in the following terms: -

> *"Very good. Thank you [Mr G] you can take a seat and keep a careful note. I have asked the Director of Public Prosecutions also to take a note, because I think he is ultimately, or she is ultimately, the respondent in this matter. Take a careful note now, sir, settle yourself down there and get out a pen and start writing.*
>
> *Okay. This is an application brought by [Mr G] seeking an issue of a private summons against certain gardaí at Ronanstown Garda Station in respect of an alleged incident which is supposed to have occurred on August 21st [sic] at Liffey Valley Shopping Centre and later at Ronanstown Garda Station. There is no doubt that private prosecutions have survived the various legislative enactments over the years, but they are extremely rare. The ultimate purpose of a private prosecution is to bring to the attention of the Director of Public Prosecutions some criminal wrongdoing and at that point, the Director of Public Prosecutions would consider taking the proceedings over.*

In looking at the unsworn information of [Mr G], which I have had the benefit of reading and considering, and hearing what he has had to say, I note that the subject matter of the – his complaint, relates to certain charges which now are before the courts, brought by the Director of Public Prosecutions at the suit of various gardaí in respect of the alleged events of 21 August 2021 [sic], that is to say the 25th of August 2021 [sic]. Therefore, it can be said as a matter of certainty the Director of Public Prosecutions is aware of the matter.

On looking at the substance of the application brought by [Mr G], the court has considered all that has been written and all that has been said, and I am satisfied in relation to the matter that any further consideration of the substance of the proceedings, they being presently extant before the court, would cause substantial risk of prejudice to those criminal proceedings. in respect of the procedural aspects of the case presently before the court I [Mr G], I consider the application to be premature. I also consider it to be a procedural abuse of the proceedings of the process of the court where criminal proceedings are presently in being and will be determined in due course. For these reasons, I refuse the application. Thank you, next case."

Submissions of the Parties.

13. The applicant in this case appeared on his own behalf. In the course of succinct and focussed submissions, he set out the following arguments: first, he stated that in his sworn information, he had set out the necessary facts to ground the alleged offences. Secondly, he submitted that no basis had been articulated by the District Court judge as to why his application for the issuance of summonses against the gardaí, constituted an abuse of process. He pointed out that this was not an application

that was brought in the context of an ongoing garda investigation. In the present case, the incident giving rise to both the prosecution against him and the prosecution that he wished to bring against the gardaí, had all taken place on the same day, being 25 August 2019. It was submitted that in these circumstances, there was no question that a person under suspicion, or being prosecuted for an offence, was attempting to obstruct the conduct of an ongoing garda investigation. He submitted that the summonses which he wished to issue against the gardaí, were more in the nature of a counterclaim that would be brought by a defendant in a civil action.

14. Thirdly, the applicant submitted that his application was not premature, due to the fact that under the relevant statutory provisions, a complaint against a garda in relation to the commission of a summary offence had to be made within eighteen months of the date of the alleged offence. It was submitted that in moving his application on 10 March 2021, he had had to do so at that time so as to bring himself within the applicable time limit. It was submitted that the District Court judge had not said how his application was premature, or when it ought properly to be brought. The applicant submitted that if he had waited until the conclusion of the criminal prosecution against him to bring his application, which prosecution had not yet concluded, he would be out of time to seek the issuance of a summons against the gardaí in respect of any summary offences.

15. On behalf of the respondent, Mr O'Malley SC stated that it was clear from the transcript that the District Court judge had read all the papers and had listened to the oral submissions of the applicant before giving his ruling. It was submitted that the present application solely concerned the question as to whether the District Court judge had acted within jurisdiction in refusing to issue the summonses in all the circumstances. It was submitted that the District Court judge had acted within

jurisdiction and had not abused his power in any way. In these circumstances, it was submitted that the court should not interfere with the order made by the District Court judge.

16. It was submitted that insofar as the District Court judge had held that the application by the applicant for the issuance of summonses against the gardaí, who themselves were bringing prosecutions against the applicant for breach of the public order legislation, constituted an abuse of process; that was a finding that the District Court judge was entitled to make, having regard to all the circumstances of the case.

17. Counsel submitted that he was not aware of any other case where a person who was facing prosecution in the District Court, had attempted to issue parallel summonses against the gardaí who were involved in the prosecution of those offences against him. It was submitted that that was a very unusual set of circumstances, which the District Court judge was entitled to take into consideration and was entitled to hold that in the circumstances pertaining in this case, amounted to an abuse of process.

18. Counsel further submitted that the court should have regard to the issue of public policy in the preservation of the right that immured in the general public to have criminal matters properly investigated and prosecuted before the court. It was submitted that public policy leant against the issuance of summonses in the circumstances that arose in the present case.

19. It was submitted that the decision of the Supreme Court in *Kelly & Anor v District Judge Anne Ryan* [2015] IESC 69, recognised that the District Court judge had a discretion when considering whether it was appropriate to issue summonses at the request of a common informer. It was submitted that in this case the District Court

judge had exercised his discretion within jurisdiction and therefore this Court should not interfere with his ruling.

Conclusions.

20. The procedure whereby criminal prosecutions can be brought by private individuals has a long history, both at common law and under statute. This procedure has undergone a number of changes with the creation of the Irish State in 1922 and the enactment of the Criminal Justice (Administration) Act 1924, which provided that all criminal charges should be prosecuted at the suit of the Attorney General of Saorstat Eireann, but also provided that any person, official or unofficial, authorised in that behalf by the law for the time being in force, should continue to have authority to bring such prosecutions. That was followed by the enactment of the Constitution in 1937 and, more recently, by the establishment of the Office of the Director of Public Prosecutions in 1974 and the abolition of preliminary examinations in criminal matters in the District Court in 1999.

21. The history of common informer prosecutions is set out succinctly in the dissenting judgment of O'Higgins CJ in *The People (DPP) v Roddy* [1977] IR 177 at p.181-186. The more recent history of this procedure was examined by the Supreme Court in the *Kelly v Ryan* case.

22. The bringing of criminal prosecutions by members of the general public is still governed by s.10(4) of the Petty Sessions (Ireland) Act 1851; the salient parts of which provide as follows:

> *"Whenever information shall be given to any justice that any person has committed or is suspected to have committed any treason, felony, misdemeanour, or other offence, within the limits of the jurisdiction of such*

justice, for which such persons shall be punishable either by indictment or upon a summary conviction…it shall be lawful for such justice to receive such information or complaint, and to proceed in respect of the same, subject to the following provisions…."

23. There are two key factors to be considered by a judge when hearing an application under s.10 of the 1851 Act, which arise from the decision of the Supreme Court in *Kelly v Ryan*, which can be summarised as follows: There must be *prima facie* evidence of each element of the offences with which the applicant seeks to have the would be accused charged (para. 8.5); in relation to the abuse of process assessment to be undertaken by the District Court judge, the judge should be satisfied that the applicant has a *bona fide* desire to invoke the criminal process against the would be accused. To that end, the DPP should be put on notice of the application, as she will take carriage of the matter, if it is sent forward for trial on indictment (para. 9.2).

24. The sworn information provided by the applicant in the present case, contained *prima facie* evidence of the necessary elements required to ground the offences alleged against the second to fifth named notice parties herein, being assault and false imprisonment. Furthermore, the District Court judge conceded in his ruling on the matter, that the DPP was on notice of the application.

25. In dealing with the issue as to whether the summonses might constitute an abuse of process, the Supreme Court in the *Kelly v Ryan* case agreed with the High Court judge, that the mere fact that a person mounting a private prosecution may have some animosity towards a potential accused, is not, of itself, a reason for making a finding of abuse of process. The Supreme Court noted that the trial judge had been right to point out that many private prosecutions have mixed motives. However, it is

necessary that at least a material part of the motivation must be a *bona fide* desire to invoke the criminal process in the case in question.

26. This Court is of the opinion that the matters to be considered by the District Court judge when considering whether a s.10 application constitutes an abuse of process, are not limited to the matters discussed in *Kelly v Ryan*. The consideration of this issue requires an assessment of all the evidence that has been put before the court on the hearing of the application.

27. As determined by the Supreme Court in *The State (Clarke) v Roche* [1986] IR 619, the process of issuing a summons on foot of a complaint is a judicial, rather than an administrative, act. Notwithstanding that, the matters to be considered must not go beyond the remit of the jurisdiction provided to the District Court judge by the Oireachtas.

28. This Court is conscious that on an application by way of judicial review, the court must avoid the temptation of stepping into the shoes of the decisionmaker and attempting to replace the decision with what it may regard as being a more desirable one: see *O'Keeffe v ABP* [1993] 1 IR 39 and *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 IR 701. Having said that, it must be noted that while the District Court judge is afforded discretion as to whether a private prosecution should be allowed to proceed under the 1851 Act, they must exercise that discretion within the confines of the jurisdiction specifically outlined in the legislation.

29. The essence of the decision given by the learned District Court judge seems to revolve around the proposition that because the applicant is facing prosecution by the gardaí against whom he wishes to issue summonses, his application was, therefore, *ipso facto*, premature and an abuse of process.

30. It must be noted that the legislature has not precluded an applicant from applying for the prosecution of gardaí, who also happen to be conducting a prosecution against the applicant pursuant to the powers conferred on the gardaí by s.8 of the Garda Síochána Act 2005. While it is certainly unusual for an individual to seek to issue summonses against the prosecuting gardaí, it is not prohibited in the legislation. If the District Court judge had reached his decision preventing the applicant from bringing such a prosecution, solely due to the fact that the same gardaí were prosecuting him for an offence under the public order legislation, such decision would have been outside the jurisdiction granted to the District Court judge.

31. In relation to the issue of prematurity, the ruling of the District Court judge does not say why this application was premature, nor when it ought properly to have been brought. Secondly, it does not address the point made by the applicant, that he had to bring his complaint before the court in respect of summary offences within eighteen months of the commission of the offence, where the person against whom the complaint is made is a member of An Garda Síochána acting in the course of their duty.

32. It is well settled at law that courts and other statutory bodies must give adequate reasons for their decisions. I am satisfied that in the present case, while the learned District Court judge, clearly read all the papers that had been put before him and listened carefully to the submissions made by the applicant, he did not give any reasons as to why the application was deemed to be premature, or why it constituted an abuse of process. There was merely a statement that he considered the application to be premature. He then went on to say simply that he considered it to be a procedural abuse of the proceedings of the process of the court where criminal proceedings are in being and will be determined in due course. If that amounts to an

assertion that a person against whom criminal prosecutions are pending can never seek the issuance of summonses against the gardaí who were involved in his arrest and detention, that would appear to go well beyond the provisions of the legislation, as it currently stands.

33. In *Kelly v Ryan*, the argument was made that the Oireachtas had by necessary implication, abolished the private prosecution procedure provided for under the 1851 Act, when it abolished the preliminary examination procedure in the District Court in the 1999 Act. It was held in both the High Court and the Supreme Court, that a statutory right that had existed for so long, could not be abolished by implication. It would need clear language to abolish such rights.

34. Similarly, the statute does not provide that persons facing prosecution, cannot avail of the right to seek the issuance of a summons against the prosecuting gardaí. One cannot read in such a blanket restriction on the right, on grounds of public policy. To do so, would involve the courts trespassing into the legislative domain and amending the legislation. That is something that the courts cannot do.

35. If the District Court judge was of opinion that in the circumstances of this case, he or she should exercise their discretion against issuing such summonses because that would amount to an abuse of process, they must state clearly why they reached that conclusion.

36. That is all the more important where a refusal at this stage, may mean that the applicant would be out of time to issue any summons against the gardaí alleging the commission of a summary offence; thereby barring his right in perpetuity.

37. Accordingly, on the grounds that the ruling of the District Court judge does not contain adequate reasons, I will quash the ruling of the District Court judge made

on 10 March 2021 and will remit the matter back to the District Court for a fresh hearing of the application.

38. As this judgment is being delivered electronically, the parties shall have two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

39. The matter will be listed for mention at 10.30 hours on 24 October 2024 for the purpose of making final orders.

40. Finally, insofar as the District Court judge referred to the risk of prejudice to the criminal proceedings, on a close reading of the transcript of the ruling, the court is satisfied that the District Court judge was not refusing the issuance of the summonses on the basis that they would cause prejudice to the criminal proceedings; but rather, was stating that any further consideration of the substance of the complaints giving rise to the criminal proceedings, might cause prejudice to those criminal proceedings. Therefore, he was not going to go into the events of 25 August 2019 in any further detail. I do not read prejudice to the criminal proceedings as being one of his reasons for refusing to grant the summonses sought by the applicant.