High Court of Ireland Decisions

Ruling

Title:	Boyle -v- The Governor of St Patricks Institution & ors
Neutral Citation:	[2015] IEHC 410
High Court Record Number:	2010 5845 P
Date of Delivery:	25/06/2015
Court:	High Court
Ruling by:	Barr J.
Status:	Approved

Neutral Citation [2015] IEHC 410

THE HIGH COURT

[2010 No. 5845 P.]

BETWEEN

KATHERINE BOYLE

PLAINTIFF

AND

GOVERNOR OF ST. PATRICKS INSTITUTION, IRISH PRISON SERVICE, MINISTER FOR JUSTICE AND LAW REFORM, IRELAND AND ATTORNEY GENERAL

DEFENDANTS

RULING of Mr. Justice Barr delivered the 25th day of June, 2015

1. The plaintiff in these proceedings was, at all material times, a teacher employed by the County Dublin Vocational Education Committee and was seconded to work as a teacher in the Prison Service. At the relevant time, she taught maths and computer science to prisoners in St. Patrick's Institution, Mountjoy Prison, Dublin.

2. Her action arises out of an incident which occurred on 3rd September, 2008, when she was found to have a mobile telephone beneath her bra-strap as she was going through the scanning machine at the entrance to the prison. The plaintiff claims that this was due to inadvertence on her part. She denies that she intended to bring the mobile phone into the prison.

3. The defendants do not accept the plaintiff's version of events. As the trial is at a very early stage, it is not appropriate to say any more about the incident.

4. The plaintiff alleges that while carrying out an investigation into the matter, the defendants wrongfully communicated with a journalist working for the *Irish Daily Star* newspaper. In essence, she alleges that the defendants leaked to a journalist, a version of the events which had occurred on 3rd September, 2008. As a result of the said leak, it is alleged that an article was written by Mr. Michael O'Toole (hereinafter "the applicant") and carried in the newspaper on 9th September, 2008.

5. The plaintiff has pleaded as follows in relation to the alleged leaking of the story to the newspaper:-

> *"13. In the premises, the plaintiff as a citizen of Ireland was at all material times entitled to basic fairness of procedures including the right to confidentiality from the first named defendant and her staff and from the second named defendant and from the other defendants, their respective servants or agents who had possession of information in relation to the incident and its investigation and the assessment of the plaintiff's employment with the defendants.*
>
> *14. Further, in communicating of and concerning the incident and in disclosing and furnishing information to the media and in particular the Daily Star of and concerning the plaintiff, the defendants, their servants or agents acted in breach of the plaintiff's constitutional right to privacy, fair procedures, her right to be employed within the State, her right to inviolability and her right to bodily integrity and right to basic fairness of procedures.*
>
> *15. Further, the defendants and each of them or one or more of them, their servants or agents were guilty of misfeasance of public office in and about disclosing and furnishing information and communicating with the media and members of the public of and concerning the plaintiff.*
>
> *16. By reason of the foregoing, the plaintiff has suffered serious personal injuries, loss, damage, mental distress, inconvenience and anxiety."*

6. On 10th June, 2015, the plaintiff issued a subpoena *duces tecum* directed to the applicant, ordering him to attend at the High Court in Dublin on 16th June, 2015, and from day to day thereafter to give evidence on behalf of the plaintiff. He was directed to bring with him and produce *"all notes, memoranda, records and reports of whatsoever nature made and received by the said person concerning the incident which occurred on 3rd September, 2008, the subject matter of these proceedings herein and all documents in connection with an article published in the edition of the Daily Star on 9th September,*

2008, under the headline 'Phone in Bra Jail Smuggler Busted'".

7. The applicant has made application to the court through solicitor and counsel for two reliefs. First, he alleges that the court should set aside the subpoena directed to him requiring him to attend and bring documents to court and to give evidence at the trial. Secondly, he asserts a claim to what has been referred to as "*journalistic privilege*", whereby he seeks a ruling from the court that he should not be required to reveal his confidential source or sources in relation to the article in question.

8. In relation to the application to set aside the subpoena, Mr. Lupton, B.L., on behalf of the applicant, referred the court to the decision in *Cully v. Northern Bank Finance Corporation Limited* [1984] ILRM 683, where O'Hanlon J. cited with approval the judgment of Scarman L.J. in *Senior v. Holdsworth ex parte Independent Television News Limited* [1976] Q.B. 23, where the learned judge stated as follows:-

> *"The law, as it now stands, does not enable the court to refuse to issue a witness summons (or subpoena) for the production of documents upon due application. The remedy available to the person served is to move to set the summons aside. Upon such an application the court will set it aside if what is sought is irrelevant, oppressive, an abuse of the process of the court or recognised by the law as being privileged from production. Further, even if the document sought be relevant and not otherwise privileged from production, the court has a residual discretion in certain circumstances to protect the document and set the summons aside."*

9. In the *Cully* case, O'Hanlon J. discharged the subpoena duces tecum because he came to the conclusion that if the witness was brought to court and required to give evidence and produce documents as required by the subpoena, it would involve him in a breach of the oath of secrecy which he was required by statute to take when he entered the service of the Central Bank. The judge held that the provisions of s. 31 of the Central Bank Act 1942, gave rise to a claim of privilege on grounds of public policy from disclosure of any information of the type referred to in the oath of secrecy.

10. The applicant also referred to the decision in *Duncan v. Governor of Portlaoise Prison (No. 2)* [1998] 1 I.R. 433, where the applicants had been convicted of various offences by the Special Criminal Court. It transpired that the orders made were invalid as one of the three judges comprising the court was, at the time of making the remand orders, no longer serving as a member of the court. Instructions were given that the applicants should be released and then be re-arrested. The applicants challenged the legality of their subsequent detention. The applicants issued a subpoena directed to the Attorney General. Counsel for the notice party applied to set aside the subpoena on the basis that there was no relevant evidence which the Attorney General could give which would not be protected by legal professional privilege.

11. The High Court (Kelly J.) held that the court had an inherent jurisdiction to set aside a subpoena. On the basis of the documents exchanged between the parties and the issues defined in them, there was no relevant evidence that the Attorney General could give and even if there was, such evidence would be protected by legal professional privilege. Accordingly, the subpoena directed to the Attorney General was set aside.

12. The applicant also referred to the decision in *McConnell v. Commissioner of An Garda Síochána & Ors* [2003] 2 I.R. 19, where a subpoena duces tecum was set aside because it was so wide in its description of the documents of which production was sought, that it would be oppressive to require the defendants to produce the documents in the time allowed in circumstances where the relevance of the documentation sought had not been shown.

13. The applicant challenged the subpoena in this case on a number of grounds. His first

two grounds were somewhat technical in nature. He pointed out that no viaticum had been enclosed with the subpoena. This is a relatively modest sum which is designed to provide transport for the witness to and from court. I am told that while the plaintiff's solicitor was remiss in not sending a *viaticum* with the subpoena, he subsequently offered the sum of €20.00 in this regard.

14. I am satisfied that while the correct amount was not sent with the subpoena, an offer was subsequently made to pay the appropriate amount. Accordingly, I refuse to discharge the subpoena on this ground.

15. The second ground was to the effect that service of the subpoena was effected on 11th June, 2015, two clear days prior to the matter being listed for trial. In the usual course, it is alleged that service should have been with three to four days notice.

16. It would appear that the subpoena was served under cover of letter dated 11th June, 2015. It required the applicant to attend before the High Court on 16th June, 2015, and, thereafter, as required. At the hearing, the applicant's counsel indicated that his client would be unavailable in the week commencing Monday, 22nd June, 2015 until Friday, 26th June, 2015. The court heard his objections on Friday, 19th June, 2015, and stated that its ruling would be handed down on Thursday, 25th June, 2015. In the circumstances, the witness has been given more than adequate notice of the days on which his testimony is likely to be required. I refuse to set aside the subpoena on this ground.

17. The third ground was that the witness had made arrangements which would involve him being away in the week commencing Monday, 22nd June, 2015. The court has taken account of his arrangements and it has been indicated that subject to this ruling, his evidence would be taken on his return to Dublin on Friday, 26th June, 2015. Accordingly, it would not appear that this ground remains relevant.

18. The fourth ground is that the applicant's testimony would be irrelevant to the plaintiff's action against the defendants. The applicant argues that he could only confirm that the article was written by him and published in the newspaper. The plaintiff does not accept this assertion. She states that the applicant is a compellable witness. The plaintiff's side wished to question the witness regardless of whether or not he is directed to reveal his sources.

19. No witness can unilaterally decide that they will not give evidence to a court because they believe that they do not have evidence which would be relevant to the proceedings. However, in fairness to the applicant, that is not what he is doing. He has answered the subpoena by being in court for the opening days of the action. He is entitled to apply to have the subpoena set aside on grounds that he would not be able to give relevant evidence at the trial. An application to similar effect was made on behalf of the Attorney General in *Duncan v. Governor of Portlaoise Prison (No. 2)* [1998] 1 I.R. 433.

20. I am satisfied that the article is of relevance to the plaintiff's case. Whether or not the applicant is directed to reveal his sources, the plaintiff's counsel are entitled to question the applicant. In their defence, the defendants have pleaded that in response to a query from the *Irish Daily Star*, the Press Officer of the Irish Prisons Service confirmed that a member of staff had been caught carrying a mobile phone and had been suspended pending an investigation. The plaintiff is entitled to ascertain precisely which parts of the article emanated from the Press Officer and which parts are from one or more of the journalist's sources. Accordingly, I refuse to discharge the subpoena on the ground that the applicant would not have relevant evidence to offer at the trial of the action.

21. Finally, the applicant argued that the subpoena was oppressive. However, his counsel

did not push this aspect. Given that the amount of documentation in the possession of the applicant concerning this article is not likely to be that great, I do not think that the applicant can allege that the requirement to bring the documentation to court would be oppressive, similar to the situation which pertained in the *McConnell* case.

22. In all the circumstances, I do not accept that the applicant has made out cogent grounds as to why the subpoena should be set aside. I refuse his application to set aside the subpoena.

23. I turn now to consider the second issue, which is whether or not the applicant should be directed to reveal the sources of his article. Counsel for the applicant has argued that he should be allowed to invoke journalistic privilege and should not be required to reveal his confidential sources.

24. The applicant submitted that he had a duty to protect his confidential sources, as regulated by Article 40.6.1(i) of the Constitution and Article 11 of the Charter of Fundamental Rights of the European Union.

25. Article 40.6.1 of the Constitution states:-

> *"The State guarantees liberty for the exercise of the following rights, subject to public order and morality:-*
>
> *(i) The right of the citizens to express freely their convictions and opinions.*
>
> *The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.*
>
> *The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law."*

26. Article 11 of the Charter of Fundamental Rights provides:-

> *"Freedom of expression and information*
>
> *1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.*
>
> *2. The freedom and pluralism of the media shall be respected."*

27. The applicant relies on the decision in *Cornec v. Morrice* [2012] 1 I.R. 804, and in particular to the following portions of the judgment of Hogan J.:-

> *"[42] While I have thus far loosely spoken of a journalistic privilege, there is, in fact, in strictness, no such thing. The protection is rather the high value which the law places on the dissemination of information and public debate. Journalists are central to that entire process, a point expressly recognised by Article 40.6.1.i of the Constitution itself when it recognises 'their rightful liberty of expression' on the part of the press, albeit counter balanced by the stipulation that this rightful liberty shall not be used to undermine 'public order or morality or the authority of the State'. Perhaps these constitutional fundamentals have been overlooked at times, in part*

possibly because the syntax and drafting of this particular clause is (uncharacteristically) awkward given that the critical proviso is somewhat obscured by being placed within a subordinate clause. The Irish language version is actually much clearer than its English language counterpart, since the privileged status of the organs of public opinion is more elegantly described, not least given that it is set out in a stand alone sentence at the end of the relevant second paragraph.

[43] Irrespective, however, of the languages used, the constitutional right in question would be meaningless if the law could not (or would not) protect the general right of journalists to protect their sources. This would be especially true of the particular example of that rightful liberty afforded by Article 40.6.1.i which is expressly enumerated therein - criticism of Government policy ('tuairimí léirmheasa ar bheartas an Rialtais') - if no such protection were available.

[44] But this right is not absolute or inviolable. In that respect, this protection differs in one key respect from legal professional privilege which, once applicable, cannot be overridden by a court by reference to some general balancing test based on the public interest. This, in essence, is what Walsh J. said in In re Kevin O'Kelly (1974) 108 ILTR 97 at p. 101 when he commented that:-

> *'[T]here may be occasions when different aspects of the public interest may require a resolution of a conflict of interests which may be involved in the disclosure or non-disclosure of evidence but if there be such a conflict then the sole power of resolving it resides in the courts.'*

[45] Similar views were expressed by Fennelly J. in Mahon v. Keena [2009] IESC 64, [2010] 1 I.R. 336 at p. 363:-

> *'[92] …While the present case does not concern information about the commission of serious criminal offences, it cannot be doubted that such a case could arise. Who would decide whether the journalist's source had to be protected? There can be only one answer. In the event of conflict, whether in a civil or criminal context, the courts must adjudicate and decide, while allowing all due respect to the principle of journalistic privilege. No citizen has the right to claim immunity from the processes of the law.'*

[46] Yet the public interest in ensuring that journalists can protect their sources remains very high, since journalism is central to the free flow of information which is essential in a free society. This is all underscored and tacitly complemented by the entire constitutional edifice, such as the democratic nature of the State (Article 5); the accountability of the executive branch to the Dáil (Article 28.4.1) and the provisions in relation to elections and referenda."

28. In *Gray v. Minister for Justice, Equality and Law Reform* [2007] 2 I.R. 654, the plaintiffs alleged that unidentified members of An Garda Síochána had leaked confidential information about a convicted rapist residing with the plaintiffs in Kerry. The journalist who wrote an article about the matter was permitted to retain the confidentiality of his sources. Nevertheless, the plaintiffs were able to establish that on balance of probabilities, the leaked information had come from members of An Garda Síochána.

29. In the course of his judgment in *Mahon v. Keena* [2010] 1 I.R. 336, Fennelly J. cited

the following passage from the decision of the European Court of Human Rights in *Goodwin v. United Kingdom* [1996] 22 EHRR 123:-

> *"Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest."*

30. The court must balance carefully the interests for and against disclosure of the journalist's sources. It seems to me that even if the journalist is allowed to keep confidential his sources for the article in question, the plaintiff will still be in a position to mount an argument to the effect that the information in the article was on the balance of probability leaked by a servant or agent of the defendants. In other words, depriving the plaintiff of the identity of the source of the article will not be fatal to her establishing in evidence the allegations contained in the Personal Injury Summons.

31. In the circumstances, it seems to me that the interests of the applicant in asserting journalistic privilege outweigh the interests of the plaintiff in having his sources revealed. Accordingly, I rule that the applicant need not reveal his confidential sources for the article. As there is a subpoena *duces tecum*, he must bring to court copies of his notes and memoranda concerning the said article. However, he can redact any parts thereof which would tend to identify his source or sources.