

THE HIGH COURT

J.R. 129 of 1987.

BETWEEN

TOSS LIMITED

APPLICANT

AND

THE DISTRICT COURT JUSTICE PRESIDING IN COURT NO. 1 MORGAN PLACE IN THE CITY OF DUBLIN, THE DIRECTOR OF PUBLIC PROSECUTIONS AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr. Justice Blayney delivered the 24th day of November, 1987.

The Applicant seeks an Order of Prohibition, by way of Judicial Review, to stop a prosecution instituted against it in the District Court, and in the alternative a declaration that certain subsections of Section 1 of the Courts (No. 3) Act 1986 (to which I shall refer as "The 1986 Act") are invalid having regard to the provisions of the Constitution.

The Applicant's claim arises in the following circumstances. On the 26th October 1986 Sergeant Brian Fenton made a complaint to the Chief Clerk of the Metropolitan District Court that the Applicant on the 14th October 1986 had committed the offence of providing facilities for unlawful gaming at his premises in Moore Street, and he applied for the issue of a Summons.

The form containing the complaint was lodged in the Computer Section of the Dublin Metropolitan District Court on the 31st October 1986. It was considered by Sean O'Gorman, the District Court Clerk assigned to the Dublin Metropolitan District Court, on the 18th November 1986, and a Summons was issued by him on the 23rd January 1987 the day after the making of the new rules under the 1986 Act which had been passed on the 19th December 1986. This Summons came before District Justice Peter Connellan on the 18th March 1987. Sergeant Fenton gave evidence of the facts on which the prosecution was based, i.e., that he had seen a woman playing a slot machine on the Applicant's premises in Moore Street, and putting in five 2p pieces. No evidence was called on behalf of the Applicant but, at the conclusion of the prosecution's case, Counsel for the Applicant applied to have the proceedings struck out on the ground that the Supreme Court had decided in The State (Clarke) .v. Roche and Senezio 1987 I.L.R.M. page 309, that the issue of a Summons was a judicial function and so a Summons issued by a District Court Clerk was invalid. The learned District Justice accepted this submission and struck out the Summons.

Sergeant Fenton immediately applied for a new Summons based on the same complaint, and a new Summons was issued by Sean O'Gorman on the 25th March 1987. It was listed for hearing on the 28th April 1987 before District Justice James Paul McDonnell and, on the application of the Applicant, was adjourned to the 3rd June 1987. On the 11th May 1987 the Applicant applied for and was granted leave to apply for an Order of Prohibition, by way of Judicial Review, in respect of the new Summons dated the 25th March 1987, and for a

declaration that Section 1 subsections (4), (5), (6) and (7) of the 1986 Act are invalid having regard to the provisions of Articles 6, 15(5) and 34 of the Constitution.

These facts have to be considered in the light of the position created by the decision of the Supreme Court in The State (Clarke) .v. Roche and Senezio, in which judgment was given on the 12th December 1986, and in the light of the 1986 Act which was passed on the 19th December 1986, the decision of the Supreme Court and the passing of the Act both having taken place between the date on which the complaint in this case was made and the date on which the new Summons was issued. In the Senezio case the issue was whether a Summons issued by a District Court Clerk in respect of a summary offence was valid if the complaint upon which the Summons was based had not been communicated to him. The Court, in a unanimous judgment delivered by the Chief Justice, held that such a Summons was invalid. And the Chief Justice went on to say in his judgment at page 315:-

"I should add, however, that I am satisfied that on the terms of section 10 of the 1851 Act it is an inescapable conclusion that the issue of a summons upon the making of a complaint was a judicial as distinct from an administrative act."

The Chief Justice concluded his judgment by indicating what might be done to remedy the position:-

"It appears to me that there is much to be said for the point of view that with regard to summary summonses issued in criminal cases by members of Garda Siochana,

at least, it is no longer necessary or appropriate for a justice of the District Court or any other person to reach a judicial determination as to whether the summons should be issued.

Consideration, therefore, it seems to me, should be given to replacing sections 10 and 11 of the Act of 1851 with statutory provisions more suitable to the modern District Court which could include the procedure for the issuing of summonses, in criminal cases at least, as being an administrative procedure only and which could then, without any question of constitutional challenge, provide that the complaint should be made to the District Court and that the summons should be issued by the officers of that court upon the making of the complaint."

Within a week of this decision the Oireachtas passed the 1986 Act. The Act does not replace Sections 10 and 11 of the 1851 Act, as had been suggested by the Supreme Court, but it does make the issue of a Summons an administrative function. The relevant parts of the Act are as follows:-

- "1 (1) Proceedings in the District Court in respect of an offence may be commenced by the issuing, as a matter of administrative procedure, of a document (referred to subsequently in this section as "a summons") by the appropriate office of the District Court.
- (2) Summonses shall be issued under the general superintendence of an appropriate District Court

clerk and the name of an appropriate District Court Clerk shall appear on each summons.

(4) An application for the issue of a summons in relation to an offence may be made to the appropriate office of the District Court by or on behalf of the Attorney General, the Director of Public Prosecutions, a member of the Garda Siochana or any person authorised by or under statute to prosecute the offence.

(6) A summons duly issued under this Act shall be deemed for all purposes to be a summons duly issued pursuant to the law in force immediately before the passing of this Act.

(7) (a) Any provision made by or under any statute passed before the passing of this Act relating to the time for making a complaint in relation to an offence shall apply, with any necessary modifications, in relation to an application under subsection (4) of this section.

(b) Notwithstanding the provisions of paragraph (a) of this subsection, where a complaint in relation to an offence was duly made by a person referred to in subsection (4) of this section and was received, on or after the 20th day of March, 1986, and before the passing of this Act and during the period within which the complaint was required by law to be

made, by a District Court clerk or a Peace Commissioner, then, not later than the 20th day of March, 1987 it shall be lawful for such person to apply under subsection (4) of this section for the issue of a summons in relation to the offence and for the appropriate office of the District Court to issue the summons.

(9) In this section -

"appropriate District Court clerk", in relation to a summons, means a District Court clerk assigned to any District Court area in the District Court district in which a justice of the District Court has jurisdiction in relation to the offence to which the summons relates;

"appropriate office of the District Court", in relation to a summons, means the office of any District Court clerk assigned to any District Court area in the District Court district in which a justice of the District Court has jurisdiction in relation to the offence to which the summons relates."

Following the passing of the 1986 Act, new rules, the District Court (Form of Summons) Rules 1987 (S.I. No. 23 of 1987) were made by the District Court Rules Committee and came into force on the 22nd January 1987. They provided for a new form of Summons where an application for the issue of a Summons in relation to an offence is made to a District Court Office

pursuant to Section 1 subsection (4) of the Act.

In its statement grounding the application for Judicial Review, the Applicant set out three grounds upon which the Order of Prohibition was being sought, but in his submissions, Mr. O'Reilly relied principally on a single ground. He argued that the receipt of the complaint by the District Court Clerk on the 31st October 1986 and its consideration by him was a judicial act and, on the authority of the Senezio case, could not be the basis for the issue of a valid Summons. He said that both the initial Summons, which had been struck out, and the new Summons, were based on the same original complaint. If a new complaint had been made after the passing of the 1986 Act, and a new Summons issued on the basis of that complaint, he accepted that he could not have objected to the validity of such a Summons as the procedure under the 1986 Act would have been followed. But he maintained that the State should not be allowed to continue with a Summons based on a complaint which had been made and considered before the 1986 Act was passed. He submitted that that Act could not operate retrospectively.

Mr. O'Reilly also submitted that subsection (7) of Section 1 of the 1986 Act was unfair: that it gave the State a chance to mend its hand. It had retrospective effect which should not be allowed.

To take the latter submission first, neither Mr. Gaffney nor Mrs. Denham, who appeared for the State, relied on this provision and it seems to me that they could not have. In my opinion in order to come within paragraph (b) of subsection (7)

of Section 1 a Summons would have had to be issued before the 20th March 1987 and the Summons in question here was not issued until the 25th March 1987. I consider that the latter part of the paragraph

"then, not later than the 20th day of March, 1987, it shall be lawful for such person to apply under subsection (4) of this section for the issue of a summons in relation to the offence and for the appropriate office of the District Court to issue the summons"

should be construed as requiring not only that the Summons had to be applied for not later than the 20th March 1987, but also that it had to be issued not later than that date. If it had been the intention of the legislature that the time limit should apply only to the application for the Summons, the paragraph should have read:-

"It shall be lawful for such person, not later than the 20th March 1987, to apply under subsection (4) of this section for the issue of a summons etc."

It would then have been clear that the time limit applied to the application for the Summons only and not to its issue. But with the time limit where it is, I consider that it must apply to the issue of the Summons as well as to the application for it, and since the Summons here was not issued until the 25th March 1987, it did not come within the paragraph and so the paragraph cannot be relied upon as giving it validity. The paragraph is in my opinion irrelevant and so could not have been relied upon by the State to mend its hand as Mr. O'Reilly suggests.

As regards the submission that the receiving and



considering of the complaint was a judicial act which could not be carried out by the District Court Clerk, it seems to me that two separate acts are involved here, and that one of them only, the considering of the complaint, could be described as being judicial. I consider that the receipt of a complaint is an administrative act only. It is not until the complaint is considered for the purpose of deciding whether to issue a Summons or not that any judicial element could be said to arise. And under the 1986 Act the District Court Clerk did not have to consider the complaint. His function was simply to issue the Summons on receipt of an application under Section 1 subsection (4), and this was the procedure pursuant to which the new Summons was issued on the 25th March 1987.

When the District Justice struck out the first Summons on the 18th March 1987, that Order did not debar the State from issuing a new Summons, and it was not argued by the Applicant that it did. Rule 66 of the District Court Rules provides that when a District Justice strikes out a complaint the "Order shall not debar the complainant from bringing fresh proceedings in the same matter". What the Applicant objects to is not that a new Summons was issued but that no new complaint was made. Mr. O'Reilly concedes, as mentioned earlier in this judgment, that if a new complaint had been made, a Summons based on that complaint issued by the District Court Clerk under the 1986 Act would have been perfectly valid.

In my opinion no new complaint was necessary. Once the original complaint was made, the District Court had

jurisdiction to hear the case - Attorney General (McDonnell) .v. Higgins 1964 I.R. 374 at 390; Director of Public Prosecutions .v. Gill 1980 I.R. 263 at page 267. And its jurisdiction was in no way impaired by the first Summons being struck out since the rules expressly provide for fresh proceedings being brought. In my opinion what has to be considered is whether the procedure for issuing a Summons introduced by the 1986 Act could be availed of in prosecuting an offence alleged to have been committed before the Act was passed, and in respect of which the complaint had also been made before the Act was passed. To put the question more briefly, is the 1986 Act retrospective in its effect? Mr. O'Reilly submitted that it is not and he referred me to Hamilton .v Hamilton 1982 I.R. page 466 and Doyle .v. An Taoiseach 1986 I.L.R.M. 695 but in my opinion these decisions do not apply because the 1986 Act deals with procedure only and that puts it into a different category from Acts which deal with substantive rights. And that it does deal with procedure only is I think clear from what Kingsmill-Moore J. said in regard to a Summons in Attorney General (McDonnell) .v. Higgins at page 391:-

"Neither summons nor warrant to arrest, consequent on the information, confer jurisdiction. They are merely processes to compel the attendance of the person accused of the offence."

Are statutes which deal with procedure only retrospective in effect? It appears to be well settled that they are. In Rex .v. Chandra Dharma 1905 2 KB 335 the Defendant was convicted of an offence under Section 5 (1) of the Criminal Law (Amendment) Act 1885. At the date of the

commission of the offence, the prosecution had to be commenced within three months. Section 7 of the Prevention of Cruelty to Children Act 1904, passed after the commission of the offence, extended the time limit from three months to six months. It was held that the Defendant had been properly convicted even though the prosecution had not been commenced within three months of the commission of the offence as Section 27 related to procedure only and was therefore retrospective. Lord Alverstone C.J. said in his judgment at page 338:-

"The rule is clearly established that, apart from any special circumstances appearing on the face of the statute in question, statutes which make alterations in procedure are retrospective. It has been held that a statute shortening the time within which proceedings can be taken is retrospective, and it seems to me that it is impossible to give any good reason why a statute extending the time within which proceedings may be taken should not also be held to be retrospective."

In my opinion there are no special circumstances appearing on the face of the 1986 Act so as to remove that Act from the general rule applicable to statutes relating to procedure, and accordingly that rule applies with the result that the 1986 Act is retrospective in its effect and accordingly the Summons issued on the 25th March 1987 pursuant to Section 1 of the Act is a perfectly valid Summons. The Applicant is therefore not entitled to an Order of Prohibition restraining the hearing of the Summons and I refuse the application for such an Order.

I now move on to the Applicant's claim that certain

subsections of Section 1 of the 1986 Act are invalid having regard to the provisions of the Constitution. This part of the case can be disposed of briefly. While in the originating statement a number of subsections of Section 1 were attacked, in his submissions to the Court Mr. O'Reilly directed his argument against one provision only, paragraph (b) of subsection (7). But, as appears from an earlier part of this judgment, I am satisfied that this provision has no relevance in the case. The State did not and could not rely on it. In the circumstances the Applicant has no locus standi to have the constitutionality of the provision considered and the declarations sought will be refused.

*J. Slaying.*