Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

The Supreme Court and the Winter of 1936-37

Delivered by Mr. Justice Gerard Hogan at 'A Century of Courts' Conference on 12th April 2024

I.

The months of November 1936, December 1936 and January 1937 have a significance in the history of the Supreme Court which is, perhaps, not sufficiently appreciated, not least because it was during this period that the composition of the Court was extended from three to five members. The sudden resignation of Mr. Justice Wylie from the High Court in July 1936 presented the Fianna Fáil Government[1] with its first opportunity to make a judicial appointment to either the High Court or the Supreme Court since it had first taken office in March 1932. That vacancy was duly filled with the appointment of the Attorney General, Conor Maguire SC, as an ordinary judge of the High Court on 2nd November 1936. But there were then a series of other developments which significantly changed the composition of the High Court and (especially) the Supreme Court.

That composition had remained remarkably stable in the preceding decade.[2] The promotion of Murnaghan J. from the High Court to the Supreme Court on 1st May 1925 following the sudden resignation of O'Connor J. on the previous day had represented the only change in the composition of the Supreme Court in the previous eleven years. And there had been only two previous appointments to the High Court during this period following the establishment of that Court in June 1924, namely, Hanna J. on 1st May 1925 (to replace Murnaghan J. following his promotion to the Supreme Court) and O'Byrne J. on 9th January 1926 (to replace O'Shaughnessy J. who had retired on 23rd December 1925).

[1] Or "Executive Council" as it was formally known under the Constitution of the Irish Free State.
[2] See generally, Geoghegan, "Three Judges of the Supreme Court of the Irish Free State" in Larkin and Dawson eds., *Lawyers, The Law and its History* (Dublin, 2013).

The next of these developments was an unexpected one. On Saturday 12th December 1936, the first Chief Justice, Hugh Kennedy, died after a sudden illness at the relatively young age of 57.[3] Kennedy had been such a dominant force in the momentous changes in the legal system from the days of the Civil War through the very establishment of the court system that it must have been almost hard at the time to visualise the Supreme Court without his forceful presence. This immediately left the Government with an important choice to make as to his successor as Chief Justice. In addition, however, the Courts of Justice Act 1936 had been signed into law by the Governor General on 28th November 1936 in what would also prove to be one of the last official functions ever performed by the three holders of that office. As part of the spill over effects of the Abdication Crisis in Britain, de Valera would seize the opportunity to abolish the Governor General and all references to the Crown in the then Constitution of the Irish Free State with effect from 11th December 1936 through the mechanism of ordinary legislation passed by the Dáil as the (then) unicameral Oireachtas.[4] Following the amendment of Article 68 of the Irish Free State Constitution, judges would now henceforth be appointed "on the authority of the Government", a situation which

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[3] "The Chief Justice's last appearance at the Courts of Justice was on the Thursday prior to his death. On that night he became unwell. On the following day the Chief Justice was confined to his home and was apparently making good progress under the care of his doctor, but on Saturday a serious relapse with a heart attack proved the heralds of death": "The Honourable Hugh Kennedy, Chief Justice of Saorstát Éireann" (1936) *I.L.T. & S.J.* 70 at 341. Other contemporary newspaper accounts corroborate this account, saying that Kennedy died "at his residence" in Clonskeagh and that "his last appearance at the Four Courts was on Thursday on which night he took suddenly ill": "First Chief Justice of Saorstát Dead", *The Sunday Independent*, 13th December 1936.

Ruth Cannon's informative blogpost, "The Mysterious Folding Doors of the Supreme Court, 1973-73", November 2021 quotes Coghlan, *The Evening Echo*, 8th January 1973 as saying:

> "In December 1936 during the Edward VII-Mrs. Simpson debacle a bell was rung in the Law Library, and all listened to the announcement: 'The Chief Justice will not sit tomorrow'. 'Has he abdicated too?' asked one of the members. It was an unconsciously grim jest, for the Hon. Hugh Kennedy, Chief Justice died unexpectedly next day."

There are features of this account which, perhaps, do not quite hang together. According to both the *Irish Law Times and Solicitor's Journal* and *The Sunday Independent* Kennedy C.J. became ill at home on the Thursday night, so if this is correct the announcement must have been made on the Friday 11th. The Supreme Court would not have been sitting on the Saturday.

[4] See generally, Coffey, "The Abdication of King Edward VIII" (2009) 44 *Irish Jurist* 000.

obtained until September 1961 when the new courts contemplated by Article 34 of the Constitution were finally established by the Courts (Establishment and Constitution) Act 1961.[5] Section 4(1) of the 1936 Act expanded the composition of the Supreme Court from three judges to five.

All of this left the Government with important judicial choices to make. De Valera first paid tribute in the Dáil[6] in generous terms to Hugh Kennedy, who was a Cumann na nGaedheal stalwart who had served as Legal Adviser/Attorney General during the Civil War and a Civil War adversary and had later served as a TD between 1923 until 1924. The Government then chose Timothy Sullivan, then President of the High Court as his replacement and he made his declaration of office on 17th December 1936. This must have come as something of a surprise given that Sullivan had absolutely no connections with Fianna Fáil and he, if anything, came from an Irish Party background. Conor Maguire, on the other hand, had impeccable revolutionary credentials. He had been a judge of the Dáil Courts[7] and was later counsel for Erskine Childers and he had been later appointed as Attorney General in March 1932 on Fianna Fáil first entering Government. He was then chosen in turn to be the President of the High Court.

The two new vacancies on the Supreme Court were filled by Mr. Justice Meredith of the High Court and James Geoghegan TD. Meredith also had impeccable revolutionary credentials, having been one of the chief organisers of the Kilcoole gun-running in July 1914 and later having served as President of the Dáil Supreme Court between August 1920 to until it was wound up in July 1922.[8] James Geoghegan TD had served as a Minister for Justice in the first Fianna Fáil administration in March 1932 and was later appointed Attorney General in November 1936 to replace Conor Maguire.

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[5] See generally the discussion of this point in *The State (Killian) v. Minister for Justice* [1954] IR 207 at 212-213, per Murnaghan J.

[6] 64 *Dáil Debates* 10 (12 December 1936): "The late Chief Justice was recognised as a great lawyer and a great judge. He was also a patriotic Irishman who gave fine service to his country." De Valera and several Government Ministers were reported as having attended Kennedy's funeral on Monday 14th December 1936: see (1936) 70 *ILT & SJ* 340 at 343.

[7] Hogan, "The Count Plunkett Habeas Corpus Application" (2022) 68 *Irish Jurist* 25 at 27.

[8] Hogan*, op.cit*. at 28.

II.

The Chief Justice's death, just as the composition of the Supreme Court was about to be extended, had a certain poignancy. Kennedy had long pressed for the membership of the Court to be extended. In what appears to be extensive hand-written notes prepared by him for his presentation to the Oireachtas Judiciary Committee in 1930, Kennedy noted that "present number of three was adopted by the Judiciary Committee [in 1923][9] from motives of economy against my urging that the number should be five." He continued:

> "The former Court of Appeal consisted of three members (sometimes four when [the] Lord Chancellor sat) but it was not a final Court of Appeal because [an] appeal lay as of right to the final Court of Appeal which was [the] House of Lords. Query whether any other country has so small a Court as a final appeal court"

Having itemised the position in Canada (including the appellate courts in the Canadian Provinces), Australia, the South of Africa and the United States of America, Kennedy then went on to say:

"*Disadvantages of having Court of three only*:

1. No margin for sickness, other work etc.
2. Not sufficient weight for obviously final decisions.
3. In case of disagreement, if majority reverse, then [in that] event minority opinion may prevail, e.g., if court of two High Court judges are reversed.

Advantages of four or five member of Court:

1. Margin for sickness or work etc. (e.g., Court of Criminal Appeal)
2. Greater weight and prestige of judgment. Bringing conviction of soundness to [the] minds of litigants and of public,
3. Greater variety of knowledge and outlook."

He went on to add that:

[9] This was a Committee chaired by Lord Glenavy (then Cathaoirleach of Seanad Éireann, but previously Attorney General for Ireland, Lord Chief Justice of Ireland and Lord Chancellor). Kennedy had a pronounced dislike for Glenavy: see MacCormaic, *The Supreme Court* (Dublin, 2016) at 23-25.

"Four may be [a] better number than five if, on equal division, it is laid down that [the] original decision should stand, as then every decision must be a majority decision. If five be the number adopted. It should be provided that four at least should be a quorum to constitute the Court: then if one [judge] has an interest or be or otherwise engaged (as in Court of Criminal Appeal or in Lunacy business etc.), the Court can go on with its work."[10]

Kennedy had previously noted the increase in business, with 103 appeals in 1927, 86 appeals in 1928 and 101 appeals in 1929. He observed:

"There has been a great increase in business in the number of bona fide appeals as compared with the former Court of Appeal, though there have disappeared:

(1) Northern Appeals.

(2) Ex parte appeals, e.g., service out of the jurisdiction, remittals, discovery, garnishee and receivers by way of equitable execution.

(3) Appeals for time; formerly the time for final appeals was one year and much injury resulted in holding up the administration of estates. No three weeks from [the] perfection of [the] order."[11]

The Oireachtas Judicial Committee duly recommended an increase in the numbers from three to five members. These recommendations were reflected in the original Courts of Justice Bill 1934 which provided for the appointment of two additional Supreme Court, but whose principal work seemed to be in the High Court itself. Kennedy wrote to the Minister for Justice, P.J. Ruttledge,[12] on 18th January 1935 to protest:

"the view which was put before the Joint [Oireachtas] Committee that the Supreme Court should have at least five judges would not be met by appointing two Supreme Court judges who would be occupied in the business of the High Court. The proposal was to strengthen and enhance

[10] Kennedy Papers, UCD Archives Department, P 4/1224.

[11] Kennedy papers, P4/1224

[12] There was here a certain irony in that here were Civil War adversaries – as an Anti-Treaty officer Ruttledge had been severely wounded in the course of the Civil War – having what appears at least outwardly to have been a civilised conversation. Ruttledge would write to Kennedy towards the end of this dialogue on 22nd October 1936 assuring him that in these matters "the views of yourself and of the Judges of the Supreme Court and the High Court…must necessarily carry very great weight": Kennedy papers, P 4/1225.

> the prestige of the Supreme Court and [to] avoid certain considerations as to majority and minority opinions, in view of the finality about to be secured to the decisions of the Supreme Court. What would in effect amount to the conferring on two High Court judges the description, status and salaries of Supreme Court Judges would not in the least give effect to the views of the Joint Committee. It would however defeat the policy of the Courts of Justice Act 1924 that the final appellate tribunal should be a complete self-contained Court and that the damage and inconvenience of judges with the High Court should be eliminated."

Kennedy later wrote to Ruttledge on 19th February 1935 pointing out that "power to lend a judge from one Court to the other to meet an occasional and purely temporary emergency as in the case of illness, if of course a matter entirely outside the foregoing observations." In the end following further correspondence with the Minister over a protracted period, a satisfactory compromise was achieved. As Ruttledge explained to the Dáil on the Report Stage of the Courts of Justice Bill 1935:

> "We have a Supreme Court in this country that is the final court of appeal, and it is necessary that that court should be in such a position that it would possess the confidence of the people of the country, or any other people interested in litigation that might arise in this country. We have the recommendation of the Joint Committee which was set up in 1929 and which reported in 1930, or 1931, that the judges of the Supreme Court should be increased in number. Another ground that might be urged as showing the necessity for an increase is that we are going to have a new system of appeals, that is, the re-hearing system, and it will be conceded, I think, that that will entail extra work for the judges.
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> At the time that committee was dealing with this matter, they not only recommended that there should be an increase in the Supreme Court for the purpose of strengthening that court, but also an increase in the number of High Court judges, and I think that, with the new system of appeals, under which judges have to go on circuit to hear appeals, you would have to have an increase in the number of High Court judges in any rate. We have taken what is called the middle course, as described by the Attorney-

> General on Second Reading. We are appointing two judges to act in the Supreme Court, but they will be available to do ordinary High Court work. In that way, we hope to avoid the expense that would be incurred in having to appoint Supreme Court judges at the same time as appointing High Court judges. We are trying to get over the expense of having to appoint High Court judges."[13]

All of this found expression in s. 4 and s. 5 respectively of the Courts of Justice Act 1936. Section 4 provided that appeals could be "heard and determined" by not less and not more than five judges of the Supreme Court. Section 5(1) enabled these additional judges of the Supreme Court to sit as High Court judges where due to illness "or for any other reason", the full number of High Court judges was not available or "on account of the volume of business to be transacted in the High Court" or for "any other reason it is expedient to increase temporarily the number of judges available for the purposes of the High Court", the Chief Justice might request a judge of the Supreme Court to sit as a judge of the High Court.

III.

Tuesday, January 12, 1937, is perhaps a now forgotten date in the history of the Supreme Court. Yet that date is not without its own importance, since it was the first day on which the Court sat as a Court of five judges. The day was marked without any special fanfare and the *Irish Law Times and Solicitor's Journal* simply recorded the fact that "the newly constituted Supreme Court of the Irish Free State sat for the first time on the 12 inst. The Court consisted of Chief Justice Sullivan, Mr. Justice FitzGibbon, Mr. Justice Murnaghan, Mr. Justice Meredith and Mr. Justice Geoghegan."[14] Apart from a number of applications in respect of part-heard cases, the business of the day was the hearing of the appeal in the case of *Attorney General (Fahy) v. Bruen (No.2).*[15] It was a further step in the direction of the modern Court which has evolved over the last 100 years from the simple

[13] 64 *Dáil Debates* Cols. 000.
[14] (1937) 71 ILT & SJ 21. *The Irish Times* duly reported the hearing, but its report focused on the fact that the case had to be re-opened after the death of Kennedy C.J. and that the substantive issue was of some importance for the operation of the licensing law: see "Bona Fide Law: Appeal in Sligo Charge: Drinks after Dance Case", *The Irish Times*, 13th January 1937. Bot other than listing the five judges, the report makes no reference to the fact that the Court had sat as a court of five for the first time.
[15] [1937] IR 125.

three judge appellate court model on its establishment in June 1924 to the modern day Court which now often sits as a court of seven judges and increasingly has the feel of something approximating a Constitutional Court.

While *The Irish Reports* version of the judgment in this case does not quite say so in terms, the judgment of FitzGibbon J. reveals that the composition of the Court in respect of that appeal had been re-constituted. The Court had already sat for three days on Tuesday, 8th December 1936, Wednesday, 9th December 1936 and Thursday, 10th December 1936 with the previous composition of the Court, namely, Kennedy C.J., FitzGibbon J. and Murnaghan J. Since, however, Kennedy C.J. had died suddenly on the morning of Saturday 12th December 1936, the appeal could not have been determined save with the consent of the parties.[16] The *Irish Law Times and Solicitor's Journal* painted an interesting account of that hearing, saying:

> "At the end of the third day, when the Court rose, the arguments and submissions of learned counsel on both sides had not concluded and the Court announced that the hearing would be resumed on Monday, 14 inst. The two double-sized tables which are available to that Court for the use of senior counsel were literally strewn with textbooks, law reports, and dictionaries, and the senior counsel on behalf of the appellant occupied the

[16] "The appeal…had been heard in part by a Court consisting of the late Chief Justice, my Brother Murnaghan and myself when a premature end was put to the argument by the death of the Chief Justice": [1937] IR 125 at 146., per FitzGibbon J. The *Irish Law Times and Solicitor's Journal* reported (19370 71 ILT & SJ 21):

> "One or two applications were made in reference to cases in which the late Chief Justice Kennedy had been a member of the Court and in which judgment had been reserved. One was the case of Fegan and others against the Great Northern Railway. Counsel on both sides agreed to accept the decision of Mr. Justice FitzGibbon and Mr. Justice Murnaghan as arbitrators but FitzGibbon J. intimated that their decision would not be binding on anyone except the parties in the case."

As it happens, Murnaghan J. delivered the judgment in *Fegan v. Great Northern Railway Co.*, on 19th March 1937 holding that the plainitffs were not entitled to invoke a national agreement concerning the resolution of a railway strike as they were based outside the Irish Free State. He noted that the parties had agreed to accept arbitration by the two surviving members of the Court.

By contrast it may be noted that in *O'Reilly v. Gleeson* [1975] IR 258 the Supreme Court found itself in a similar situation when FitzGerald C.J. died suddenly on 17th October 1974. The parties agreed to be bound by the judgments of the other two members of the Court, Henchy and Griffin JJ.: see [1975] IR 258 at 268.

> attention of the Court for two-and-a half days in his citations from the mass of literature in front of him…The judgment of the Supreme Court was being awaited with interest, particularly having regard to the fact that the number of licence-holders for the sale and supply of intoxicating liquor in the Saorstát is well over 10,000. Death's sad intervention has postponed the determination of the question."[17]

The Court then re-assembled on 12th January 1937 with three new members, namely, Sullivan C.J., Meredith and Geoghegan JJ.

The issue which was presented in *Bruen was* not itself without interest, concerning as it did the meaning of that hallowed phrase in licensing laws, the concept of the "bona fide traveller". The defendant in that case was the proprietor of a licensed premises in Rosses Point. He held public dances in a hall which formed part of the licensed premises, but which was structurally separated from it. The premises were more than five miles distant from Sligo town and a special bus "runs to and from Sligo for the convenience of persons attending the dances"[18] Certain patrons were then given a special pass which enabled them to enter the licensed premises where they were then served with alcoholic drinks. Were these patrons "bona fide travellers" for the purposes of s. 15(1) of the Intoxicating Liquor Act 1927?

In the District Court, District Justice Flattery found that the travellers were bona fide travellers in this sense and dismissed the summons. The prosecutor appealed this decision by way of case stated to the High Court under s. 2 of the Summary Jurisdiction Act 1857. In the High Court Hanna J. held[19] that the defendants were not bona fide travellers in this sense. They had made two journeys and during these journeys the privilege conferred by the 1927 Act. It did not, however, apply to the interval of several hours spent at the dance.

The defendant sought to appeal this decision to the Supreme Court, but they were met with two objections. First, it was said that an appeal was barred by s. 83 of the Courts of Justice Act 1924 which had stated that the "determination of the

[17] (1936) 70 *ILT & SJ* 339.
[18] *Attorney General (Fahy) v. Bruen* [1936] IR 750 at 751.
[19] *Attorney General (Fahy) v. Bruen (No.2*) [1937] IR 125.

High Court…shall be final and conclusive and not appealable." But Murnaghan J. held in *Bruen (No.1)* that since the District Justice had delivered his decision, the case stated was governed by the Summary Jurisdiction Act 1851 "and not under s. 83 of the Court of Justice Act 1924 which provides for a new, consultative case stated before determination."[20] The second objection was that s. 50 of the Supreme Court of Judicature (Ireland) Act 1877 had precluded appeals from any decision of the High Court "in any criminal cause or matter." Murnaghan J. noted that the effect of Article 66 of the Irish Free State Constitution – which corresponds to the present constitutional provisions governing the right of appeal from the High Court to the Court of Appeal in Article 34.4.3° – was that "such exception must be found in a law made subsequent to the adoption of the Constitution." It followed that "the previous limitation on appeal" contained in s. 50 of the 1877 Act was "thus abrogated"[21] and that Bruen was entitled to maintain his appeal.

It was thus the reconstituted Supreme Court of five judges which heard the appeal on the merits. Following a detailed exposition of the law in this area, the Court reversed the conclusions of Hanna J. and held that the defendants were indeed bona fide travellers for the purposes of the section. While the s. 15 of the 1927 Act was itself repealed by s. 3 and the Schedule to the Intoxicating Liquor Act 1960, the judgments in *Bruen* are still of some interest. First, FitzGibbon J.'s judgment is of interest in that it applies the principle that when a court has pronounced definitively on the meaning of a statutory phrase and this phrase is subsequently used in a statute *in pari materia*, the Oireachtas is presumed to have adopted the meaning of that phrase as previously judicially interpreted.[22] Meredith J. also sought to provide guidance on the concept of "bona fide" used in conjunction with traveller. In this situation Meredith J. suggested that the person concerned "must be undertaking the purposive action, that makes the description applicable, in good faith with the Legislature, and, therefore, not for the mere purpose of evading the provisions of the Legislature."[23]

[20] [1936] IR 750 at 764.
[21] [1936] IR 750 at 764.
[22] See *Cronin v. Youghal Carpets (Yarns) Ltd*. [1985] IR 312 at 32 for the application of this principle by Griffin J., but without, however, any reference to *Bruen*.
[23] [1937] IR 125 at 171.

IV.

As it happens, the Court delivered 37 reserved judgments in 1937, of which 18 involved the entire ordinary composition of the Court[24]; of which 9 had a court of four and a further 10 simply had a court of three. The practice of sitting as a court of four was always going potentially to be problematic given the risk of the Court dividing evenly. This first came to pass on October 20th, 1937, when the Supreme Court was evenly divided in *Re Earle*[25] an important contempt case. This question of a Supreme Court consisting solely of four members undoubtedly gave rise to problems from time to time. On 23rd November 1949 the then Minister for Justice (General MacEoin TD) agreed in response to a Dáil question that it was:

> "undesirable that the [Supreme] Court should ever be constituted of an even number of judges if it can possibly be avoided, and that in all circumstances a court of three is to be preferred to a court of four. But I recognise that valid objections may be urged against a court of three and that, in fact, it was because of these objections that the law with respect of the composition of the Supreme Court was changed in 1936. If there were to be legislation [prohibiting four judge courts] the position would be, as experience has shown, that more frequent recourse would have to be made to a court of three, which, save for special and limited purposes, it was the object of the Act of 1936 to get away from."[26]

In the end the change in respect of uneven numbers of judges would only come about with s. 7(3) of the Courts (Supplemental Provisions) Act 1961.[27] Yet the winter of 1936-1937 is notable for the fact that the extension of the composition of Supreme Court from three to five members – a long held ambition of Hugh

[24] I.e., not including the President of the High Court as an ex-officio member.

[25] [1938] IR 485.FitzGibbon and Meredith JJ. were in favour of affirming the High Court order directing an order of attachment in respect of the mother of a young child the subject of a habeas corpus application, whereas the Murnaghan and Geoghegan JJ. considered that the order was irregular for want of service of the motion for attachment. As the Court was evenly divided the order was affirmed.

[26] 118 *Dáil Debates*, Col. 000 (23 November 1949).

[27] Now as substituted by s. 7 of the Courts and Court Officers Act 1995. Article 26.2.1° of the Constitution requires a court of five judges when considering the constitutionality of a Bill referred by the President and s. 7(5) of the Courts (Supplemental Provisions) Act 1961 (as substituted by s. 7(5) of the Courts and Court Officers Act 1995) requires a court of five judges in cases involving a question "of the validity of a law having regard to the provisions of the Constitution."

Kennedy – happened to coincide with Kennedy's death. This visionary judge thus unfortunately never got to see the realisation of his dream.

*Judge of the Supreme Court. I should my record my thanks to the Archives Department of UCD for permission to quote from the Hugh Kennedy papers. I should also thank Professor Kevin Costello for drawing my attention to the article regarding Kennedy's death in *The Sunday Independent*, 13th December 1936. I am also grateful to my judicial assistant, Oisín Mag Fhogartaigh, for accessing this article and *The Irish Times* for 13th January 1937.