

THE HIGH COURT

2005 No. 558 J.R.

JONATHAN GORMLEY

APPLICANT

AND

DISTRICT JUDGE BRYAN SMYTH

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

Judgment of Mr. Justice O'Neill delivered on the 29th day of July, 2008.

1. In these proceedings the applicant was granted leave to apply for judicial review by this Court (McKechnie J.) on 30th May, 2005, for the following reliefs:

1. An order of certiorari quashing the Order of the first named respondent made on 5th April, 2005 sending the applicant forward for trial in the Dublin Circuit Court on foot of the charges set out in the statement of charges attached to the book of evidence grounding the prosecution entitled "*The People at the suit of the Director of Public Prosecutions and Jonathan Gormley.*"

2. An injunction by way of judicial review restraining the second named respondent from prosecuting the applicant in respect of the said charges in the Dublin Circuit Court.

2. Leave was granted by this Court on the grounds, set out at paras. E (1) to (8) inclusive and E (13) and E (14) of the Statement of Grounds, which were summarised by Mr. O'Higgins S.C. and Mr. O'Lideadha S.C., counsel for the applicant, in their written submissions to be as follows:-

"(a) the order sending [the applicant] forward [for trial] was made without jurisdiction since under the relevant Acts and Rules, a summary trial cannot be converted into a trial on indictment on the direction of the D. P. P. [Director of Public Prosecutions] (under s. 4A of the Criminal Procedure Act 1967, as inserted by s. 9 of the Criminal Justice Act 1999, and Order 24, Rules 1 and 3 of the District Court Rules);

(b) the D.P.P. did not withdraw his consent to summary disposal; there was no material sufficient to ground such a withdrawal;

(c) the continued prosecution on foot of the order sending forward would be in breach of the Applicant's constitutional rights. "

3. Following an appeal by the applicant of the judgment and order of this Court (McKechnie J.) of 30th May, 2005, leave was granted to the applicant by the Supreme Court to rely in his application for judicial review on the additional grounds set forth at paras. E (9) to (11) inclusive of the Statement of Grounds. These grounds are as follows:-

"9. The Second Named Respondent had no power or function to 'direct' trial on indictment and the communication to the First Named Respondent of such a purported 'direction' amounted to an erroneous representation of the law and the respective roles of the parties and amounts to 'overstepping the function' of the Second Named Respondent.

10. The said procedure adopted by the Third Named Respondent amounted to an abuse of process and a breach of the Applicant's right to fair procedures.

11. The said procedure was adopted in breach of the Applicant's right that justice be seen to be done in this case. "

4. The factual background in this case is as follows:-

5. The applicant was charged in the District Court on 8th December, 2004, with offences under s. 2 of the Criminal Damage Act 1991, and s. 3 of the Non-Fatal Offences Against the Person Act 1997, and was remanded in custody. The applicant appeared again in the District Court on 14th December, 2004. On that date his application for bail was refused and a garda, on behalf of the D.P.P., indicated to the learned District Judge that the D.P.P. was consenting to the summary disposal of the charges. The learned District Judge was given a summary of the evidence proposed to be given. He considered the offences to be minor in nature and accepted jurisdiction to hear the case. The applicant entered a plea of not guilty and was remanded in custody to 10th January, 2005. The case was adjourned to 7th February, 2005, to allow for a further witness statement to be taken. A further adjournment was granted on that date as another District Judge, unfamiliar with the case was presiding. On 20th February, 2005, a solicitor for the D.P.P. informed the District Judge that the D.P.P. was "directing" a trial on indictment in the case of the applicant. The applicant's solicitor objected to this on the grounds that the D.P.P. could not "direct" the District Judge to relinquish jurisdiction once the matter had been determined as suitable for summary trial. The D.P.P. invited the District Judge to reconsider and the matter was adjourned to 2nd March, 2005. Legal submissions were made on that date. It was argued on behalf of the D.P.P. that he had the right not to give reasons for his decisions and to change his mind as to decisions made. The applicant's solicitor made the case that there was no jurisdiction to permit the procedure now being purportedly directed by the D.P.P. The learned District Judge determined on that date that the matter be sent forward for trial and adjourned the matter for service of the book of evidence to 16th March, 2005. The applicant was sent forward for trial on 5th April, 2005. The applicant's case was listed for mention in Dublin Circuit Criminal Court on 22nd April, 2005, and was adjourned on the basis that judicial review proceedings were being instituted.

6. It emerged in the evidence on affidavit in this Court that a garda, on behalf of the D.P.P., had erroneously advised the District Court on 14th December, 2004, that the D.P.P. consented to the summary disposal of the case against the applicant. In fact, the D.P.P. had not received the garda file at that point in time and the question of the mode of trial and venue had not been considered by the D.P.P. On 17th February, 2005, the D.P.P. issued a direction that the case of a co-accused was to proceed on indictment and consent was given for the return for trial. A direction was similarly made in the case of the applicant, to the effect that, his case was to proceed on indictment and consent was given for the return for trial. That direction was relayed to the District Court and the learned District Judge made the return for trial order on 5th April, 2005.

7. The central issue that arises in the instant proceedings is whether the return for trial on indictment in this case was made without jurisdiction by the learned District Judge by reason of being in breach of the provisions of s.4A of the Criminal Procedure Act 1967, as inserted by s.9 of the Criminal Justice Act 1999, and O.24, rr. 1 and 3 of the District Court Rules.

8. It was argued on behalf of the applicant that the D.P.P. had no power or function to "direct" trial on indictment to the District Judge under s. 4A of the Criminal Procedure Act 1967, as inserted by s. 9 of the Criminal Justice Act 1999, (s. 4A of the Act of 1967) and O. 24, rr. 1 and 3 of the District Court Rules 1997. On the part of the D.P.P., it was contended that it was a matter for a district judge to ensure that the various elements in s. 4A were present before deciding to exercise his statutory function to send an accused forward for trial on indictment. In this regard it was submitted that the applicant was, on 2nd March, 2005, remanded in custody to 16th March, 2005, for service of the book of evidence. On the latter date the case was again adjourned to 21st March, 2005. The applicant was then remanded until 5th April, 2005, when he was sent forward for trial. It was submitted that this sequence of events implied that the District Court was informed of the intention of the D.P.P. to have the matter proceed on indictment as far back as 2nd March, 2005, and the case was not being dealt with summarily since that date.

9. The relevant statutory provision in the instant proceedings is s. 4A of the Act of 1967, which deals with proceedings relating to indictable offences. It provides:-

"4A - (1) Where an accused person is before the District Court charged with an indictable offence, the Court shall send the accused forward for trial to the court before which he is to stand trial (the trial court) unless-

(a) the case is being tried summarily,

(b) the case is being dealt with under section 13, or

(c) the accused is unfit to plead.

(2) The accused shall not be sent forward for trial under subsection (1) without the consent of the prosecutor.

(3) Where the prosecutor refuses to give a consent required under subsection (2) in relation to an indictable offence, the District Court shall strike out the proceedings against the accused in relation to that offence.

(4) The striking out of proceedings under subsection (3) shall not prejudice the institution of proceedings against the accused by the prosecutor.

(5) The accused shall not be sent forward for trial under subsection (1) until the documents mentioned in section 4 B(1) have been served on the accused."

10. Order 24, rules 1 and 3 of the District Court Rules 1997 are relevant. They state as follows:-

"1. Where an accused person is before the Court charged with an indictable offence which the Court has jurisdiction to deal summarily if the accused does not object, the Judge shall inform the accused of his or her right to be tried by a jury, and if the accused, on being informed by the Court of his or her right to be tried with a jury, does not object to being tried summarily, and the Director of Public Prosecutions consents to the accused being tried summarily for such an offence, and if, after hearing such facts as may be alleged in support of the charge, the judge is of opinion that they constitute a minor offence fit to be so tried, the Judge shall take the accused's plea and try him or her summarily...

3. Where an accused person is before the Court charged with an indictable offence requiring the consent of the Director of Public Prosecutions to summary trial, then, on such consent being conveyed to the Court, the Court shall proceed in accordance with the provisions rule 1 hereof."

11. The combined effect of these provisions appears to be that where a person is charged with an indictable offence, in order for him to be tried summarily in the District Court, the D.P.P must first consent to that course. Secondly, the accused, on being informed by the District Judge of his right to be tried by a jury, consents to summary trial and finally the District Judge, on hearing a statement of the facts relevant to the alleged offence, must be of opinion that the offence is a minor offence. If any of these three elements are missing, the offence cannot be tried summarily.

12. Indictable offences, provided they may be regarded as minor, can be tried summarily in the District Court. No offence may ever be tried by a court of summary jurisdiction if the court considers it is not a minor offence. Articles 38.1, 38.2 and 38.5 of Bunreacht na hÉireann provide as follows:

"1. No person shall be tried on any criminal charge save in due course of law.

2. Minor offences may be tried by courts of summary jurisdiction ...

5. Save in the case of the trial of offences under section 2, section 3 or section 4 of this Article no person shall be tried on any criminal charge without a jury."

13. In the instant proceedings the applicant was charged with so-called "hybrid" offences under s. 2 of the Criminal Damage Act 1991, and s. 3 of the Non-Fatal Offences Against the Person Act 1999. These are statutory offences for which an accused person can be prosecuted either summarily or on indictment, where the statute itself does not outline the circumstances under which one option should be chosen rather than the other. The problem encountered in this case is not distinguishing between a minor offence and a non-minor one. This difficulty does not appear to have exercised the learned District Judge at all. What caused the District Judge to alter his course from having accepted jurisdiction to try the applicant summarily was the intimation from the second named respondent that he had changed his mind, leaving the District Judge to conclude that he had no option but to send the applicant forward for trial on indictment.

14. I am satisfied from the evidence on affidavit in this case that the true state of affairs was that the second named respondent had never consented to summary trial and the indication to the court that he had on 14th December, 2005, was the result of an honest mistake, in the interpretation by the prosecuting garda of his instructions from his superior officer. In my opinion, that mistake or the approach apparently taken by the solicitor for the second named respondent, in suggesting that the second named respondent had changed his mind, could not confer on the learned District Judge a jurisdiction to try the case summarily, when an essential prerequisite for a summary disposal was missing, namely the consent of the second named respondent. There is no question of the second named respondent "directing" the District Judge to send the applicant forward for trial. The absence of his essential consent to summary disposal necessarily excluded a summary trial and no amount of tangential debate on what was submitted to be an

inappropriate exercise of the second named respondent's power, could supply or replace that essential consent.

15. In these circumstances, the learned District Judge was not only acting within jurisdiction when sending the applicant forward for trial, but in fact he had no other option when the second named respondent had not only not consented to a summary trial, but had furnished his consent as required under s. 4A of the Act of 1967 to the applicant being sent forward for trial on indictment.

16. I am satisfied, therefore, that I must dismiss this application for judicial review of the decision of the learned District Judge.