THE HIGH COURT

[2017 No. 1128 S. S.]

IN THE MATTER OF SECTION 52 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT, 1961

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA PATRICK CUNNINGHAM)

PROSECUTOR

AND

ROBERT MCGILLOWAY

ACCUSED

JUDGMENT of Mr. Justice Coffey delivered on the 14th day of December, 2017.

1. This is a consultative case stated by Judge Kelly of the District Court pursuant to s. 52(1) of the Courts (Supplemental Provisions) Act, 1961.

2. At issue is the meaning and effect of s. 4(5) of the Criminal Justice Act, 1984 and the legal consequences that follow from a failure to comply with its provisions.

Background

3. On the 16th February, 2016, the accused appeared before the District Court at Carndonagh, Co. Donegal charged with arson contrary to s. 2 of the Criminal Damage Act, 1991.

4. At the commencement of the hearing, counsel for the accused raised a preliminary issue as to the jurisdiction of the District Court. It was contended that having terminated the accused's detention pursuant to s. 4(5) of the Criminal Justice Act, 1984 ("the Act"), the gardaí were obliged to charge the accused "forthwith" which they failed to do, which it was argued tainted with illegality his subsequent detention, charging, admission to station bail and appearance before the District Court such as to deprive the District Court of jurisdiction to embark upon his trial.

5. The case stated discloses that the arresting officer, Garda Cunningham gave evidence to the District Court on the 16th February, 2016 as follows:

> "(a) The accused was arrested on the 7th November, 2014 and detained under s. 4 of the Criminal Justice Act, 1984 for questioning in Buncrana Garda Station.
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> (b) The interview of the accused finished at 21.33 on the 7th November, 2014.
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> (c) The Superintendent directed Garda Cunningham to a charge the accused at 21.43 on the 7th November, 2014. He told Garda Reid, after receiving directions that he wanted to terminate the detention of the accused and re-arrest him for the purpose of charge pursuant to s. 10(2) of the Criminal Justice Act, 1984.
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> (d) The accused was returned to a cell at 21.51 and remained there until 22.50 at which time he was released from his detention under s. 4 of the Criminal Justice Act, 1984 and charged with the offence. That was the time it took to prepare the charge, to get the court date, and have the charge sheet printed.
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> (e) Garda Cunningham stated that it was normal practise to hold an accused in a cell while preparing a charge sheet.
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> (f) Garda Cunningham stated that there was an issue in relation to printing the charge sheet as he was not normally stationed in Buncrana but in Muff and the printers in Buncrana required a pin code. He had to get another member to go inter Pulse and enter a code for the printer.
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> (g) Garda Cunningham stated that the accused cooperated with the gardaí.
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> (h) Garda Cunningham stated that there was no staff meal break between 21.43 and 22.50."

6. The Member in Charge, Garda Reid gave evidence to the court on the 17th February, 2016 which is set out in the case stated as follows:

> "(i) Garda Reid gave evidence that between 21.43 and between 21.51 the accused was in custody area at the desk or sitting in a chair.
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> (ii) At 22.50 Garda Reid informed the prisoner that he was released from detention under s. 4 and was now being held for the purpose of charge;
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> (iii) Garda Reid stated that the accused was placed in a cell to maintain safe custody of the accused.
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> (iv) Garda Reid stated that there was an issue with the printer requiring a pin code and indicated that his pin code may have been used to print the charge.
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> (v) Garda Reid stated that the accused was retained in custody to be charged.
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> (vi) Garda Reid stated that he was aware that Garda Cunningham was preparing charges, and also that there was a difficulty with Garda Cunningham using the printer in Buncrana Garda Station.
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> (vii) Garda Reid stated that he placed the accused in a cell for safe keeping, and to ensure that he did not escape, and that it was normal procedure when a person was not being interviewed that he would be placed in a cell. In the case of the accused, he stated that he was retained in custody to be charged and because he believed he was resident in

Northern Ireland, as there were two addresses in his custody record, one in Northern Ireland.

(viii) Garda Reid stated that there was no other prisoners/accused in custody or in the Garda Station on the night of the 7th November, 2014."

7. On the 18th July 2017 the learned judge heard submissions from the State Solicitor for County Donegal who argued that the issue raised by the accused was dealt with by the judgment of the High Court (Ryan J.) in *Broe v. DPP* [2009] IEHC 549. The learned judge states that:-

"(he) held that, as in *Broe*, there was in fact no breach of the constitutional rights of the accused. He was lawfully arrested, he was to be charged and brought before the District Court as soon as practicable, and this is what happened. The only issue (was) the timing of the presentation of the charges to him, and in the light of the decision in *Broe*, (he) held that (the accused) was lawfully before the court notwithstanding the delay in charging him".

8. Against this background, the learned judge has submitted the following questions for the opinion of this Court:

> "(i) Owing to the requirement that an accused be released "forthwith" upon the conclusion of an investigation of an offence under s. 4 of the Criminal Justice Act, 1984, as amended, did the further detention under s. 4 after the direction of the Superintendent to charge the accused amount to an unconstitutional encroachment on the liberty of the accused?
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> (ii) Does the word "unless" qualify the necessity for the Gardaí to act immediately?

(iii) Does the words "charge or case to the charged" gave Gardaí a reasonable amount of time to research and prepare the necessary wording for the actual charge?

(iv) If the answer to (i) is yes, does it follow that the subsequent charge is tainted with unconstitutionality such that the District Court should not embark upon the trial of the matter?"

The Law
9. Section 4 of the Criminal Justice Act, 1984, as amended, permits the gardaí to detain a suspect for investigative purposes for varying periods up to 24 hours from time of arrest.

10. Section 4(5) of the Act provides an important safeguard to ensure that the police power given by the Act of 1984 to detain a suspect is used solely for the purpose of investigation and not otherwise. Section 4(5) of the Act provides:

> "If at any time during the detention of a person pursuant to this section there are no longer reasonable grounds for believing that his detention is necessary for the proper investigation of the offence to which the detention relates, he shall, subject to subs. 5(A) be released from custody forthwith unless he is charged or caused to be charged with an offence and is brought before for a court as soon as may be in connection with such charge or his detention is authorised apart from this Act."

11. Section 4(5) of the Act thus imposes on the gardaí a mandatory duty to release "forthwith" from custody a person who is no longer the subject of investigation unless a continuance of the detention is necessary for the purpose of charging that person and bringing him or her to court "as soon as may be" or where the detention is otherwise authorised.

12. A continuance of the detention for the purpose of charging a suspect is permitted under the subsection where the suspect is charged "or" is caused to be charged.

13. The disjunctive use of the word "or" makes it clear that a distinction is to be made between the act of charging a suspect and the process of causing a suspect to be charged. This is clear not only from a literal reading of the subsection but also from the application of the rule *verba ita sunt intelligenda ut res majis valeat quam pereat* which requires that were possible the intention of the legislature is not to be treated as vain or left to operate in the air (see *Craies on Legislation*, 8th Ed., 2004).

14. It is a matter of happenstance as to whether the gardaí will or will not be in a position to charge a suspect at the precise moment that his or her s. 4 detention ought to be properly terminated. The law has long required that when a person is arrested and brought to a garda station and is being charged with an offence that particulars of the offence alleged against that person shall be set out on a charge sheet, a copy of which shall be furnished as soon as may be to the person against whom the offence is alleged (see Order 17 Rule 1 of the District Court Rules). It has also long been the practise to read over the charge sheet to the prisoner and to administer the legal causation before the prisoner replies. In recognition of this, s. 4(5) of the Act provides that a continuance of the detention is permitted to "charge" the suspect forthwith (where such a charge sheet is available) or to "cause" the suspect to be charged (where the necessary preparatory steps must be taken before a charge sheet can be produced and read over to the accused). It is also clear from the subsection that the charging of the accused in the manner prescribed and the bringing of that person to court ought to be done "as soon as may be".

Legal Consequences of Failure to Comply with Section 4(5)
15. Assuming without deciding that an accused has not been properly charged in accordance with s. 4(5) of the Act, the issue arises as to whether such failure of itself has the legal consequence of invalidating all subsequent proceedings before the District Court before which the accused appears.

16. The accused's case at its highest is that at some point between 21.43 and 22.50 on the 7th November, 2014 his detention became unlawful by reason of the failure of the gardaí to charge him in compliance with s. 4(5) of the Criminal Justice Act, 1984 with the result that he was deprived of his constitutional right to liberty which it is contended deprived the District Court of jurisdiction to try him.

17. It is well settled that antecedent illegality of such a nature whether it relates to the detention of an accused, the charging of the accused, the granting of station bail to the accused or illegality in the manner in which the accused is brought to court does not of itself affect the jurisdiction of the District Court to embark upon any criminal proceeding. To this general rule, there are two exceptions:

> (1) Where by statute or otherwise, the lawful presence of the accused before the court is a condition precedent to jurisdiction. For example, under s. 43 of the Offences against the State Act, 1939, the jurisdiction of the Special Criminal

Court is dependent on the accused being lawfully brought before it;

(2) where there has been an egregious violation of the accused's constitutional rights of the nature and gravity that occurred in *The State (Trimbole) v. Governor of Mountjoy Prison* [1985] I.R. 550.

18. These principles have been adopted and applied in numerous cases including the decision of Ryan J. in *Broe* supra. The most comprehensive statement of the law on this issue, however, is to be found in the judgment of Keane J. (as he then was) in *Killeen v. Director of Public Prosecutions* [1997] 3 I.R. 218 where at p. 228 he stated:

> "It can, in general, be said that the jurisdiction of the District Court to embark on any criminal proceeding, including the holding of a preliminary examination, is unaffected by the fact, if it be the fact, that the accused person has been brought before the court by an illegal process. This so held by Davitt P. in *The State (Attorney General) v. Fawsitt* [1955] I.R. 39, at p. 43 where he said:
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> > "The usual methods of securing the attendance of an accused person before the District Court, so that it may investigate a charge of an indictable offence made against him, is by way of arrest or by way of formal summons, but neither of these methods is essential. He could, of course, attend, voluntarily, if he so wished; so far as the exercise of the Court's substantive jurisdiction is concerned it is perfectly immaterial in what way his attendance is secured, so long as he is present before the District Justice in Court at the material time. Even if he is brought there by an illegal process, the Court's jurisdiction is nonetheless effective."
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> Some qualifications to that general principle may be noted in passing. First, evidence obtained from the accused person during the course of a detention which proves to be unlawful, whether because of a defective warrant or for some other reason, may subsequently be excluded as inadmissible by the court of trial. Secondly, where the process by which the person is brought before the court involves a deliberate and conscious violation of his constitutional rights, of which the most graphic example is The *State (Trimbole) v. The Governor of Mountjoy Prison* [1985] I.R. 550, the court may be justified in refusing to embark upon the hearing. There may also be cases in which a question is raised as to the validity of the detention in garda custody of a person brought before the District Court, in which case the appropriate course is to remand the person concerned, enabling him, if he wishes so to do to apply to the High Court for an order of *habeas corpus.* (See the observations of McCarthy J. in *Keating v. Governor of Mountjoy Prison* [1991] 1 I.R. 61)."

19. These principles were applied to facts very similar to the facts in the instant case by the Supreme Court in *Whelton v. District Judge O'Leary and another* [2011] I.R. 544. In that case, the illegality complained of was a delay of approximately 55 minutes on the part of the gardaí before they charged the accused following his rearrest pursuant to s. 10(2) of the Criminal Justice Act, 1984. The Supreme Court held that even if there was a defect in the manner in which the gardaí arrested, detained and charged the applicant, and in particular, if there had been no intention to charge the applicant forthwith, the jurisdiction of the District Court to try the applicant was not affected in the absence of a deliberate and conscious intention to deprive him of his constitutional rights of the "graphic" nature that occurred in the *Trimbole* case.

20. In this case the District Judge has already determined that there was no breach of the constitutional rights of the accused. Whilst conceding that the continuance of his detention for the purpose of charging the accused did not of itself result in an unlawful detention, senior counsel for the accused at the hearing of the case stated contended that in circumstances where it was accepted that he was being cooperative, the placing of the accused in a cell as a matter of "normal practice" whilst a charge sheet was being prepared violated his constitutional right to liberty. There is support for this contention in the minority judgment of McKechnie J. in the *Whelton* case supra who held that the placing of the applicant in a cell as a matter of "routine practice" did render his detention unlawful. However, having so held, McKechnie J. nonetheless went on to hold that the applicant "simply (could not) succeed on this point" because "the validity of his arrest or his charging prior to his appearance before the District Court are not prerequisites to that court having jurisdiction to try him …". Similarly in this case, it seems to me that even if the learned judge had found that there was no justification for the placing of the accused in a cell for the period whilst the relevant charge sheet was being prepared, his subsequent unlawful detention before being admitted to station bail is very far removed from a deliberate and conscious violation of the constitutional rights of a detained person of the "graphic" nature that occurred in *Trimbole* and cannot of itself, therefore, deprive the District Court of jurisdiction.

21. For the foregoing reasons, I will answer the questions submitted by the District Judge as follows:

(1) No.

(2) Yes.

(3) Yes.

(4) It does not arise, but no.