

## THE HIGH COURT

2017 No. 614 JR

Between:

MARTIN O'BRIEN

APPLICANT

– AND –

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 28th February, 2018.

## I

## Overview

1. Mr O'Brien is charged with two offences under s.15(1) of the Criminal Justice (Theft & Fraud Offences) Act 2001, as amended. He seeks to challenge a refusal by the Dublin Circuit Criminal Court of an application, brought under s.4E of the Criminal Procedure Act 1967, as amended, to dismiss the charges brought against him.

## II

## Relevant Statutory Provisions

(i) Section 15(1).

2. Section 15(1) of the Act of 2001, as amended by s.47(a) of the Criminal Justice Act 2007 provides as follows:

*"(1) A person who is, when not at his or her place of residence, in possession of any article with the intention that it be used in the course of or in connection with –*

*(a) theft or burglary,*

*(aa) robbery,*

*(b) an offence under section 6 or 7,*

*(c) an offence under section 17 (blackmail, extortion, demanding money with menaces) of the Criminal Justice (Public Order) Act, 1994, or*

*(d) an offence under section 112 (taking a vehicle without lawful authority) of the Road Traffic Act, 1961,*

*is guilty of an offence."*

*(ii) Section 4E of the Act of 1967.*

3. So far as relevant to the within application, s.4E of the Act of 1967, as amended, provides as follows:

*"(1) At any time after the accused is sent forward for trial, the accused may apply to the trial court to dismiss one or more of the charges against the accused..."*

*(4) If it appears to the trial court that there is not a sufficient case to put the accused on trial for any charge to which the application relates, the court shall dismiss the charge."*

## III

## Background Facts

4. Mr O'Brien stands charged with two offences under s.15(1) of the Act of 2001, namely possession of an article with the intention that it be used in the course of or in connection with a theft. These items were a so-called 'jimmy bar' (which the court understands is a colloquial term for a crowbar) and a screwdriver. He currently awaits trial before Dublin Circuit Criminal Court. It is alleged that: (i) Mr O'Brien was a front seat passenger in a vehicle being driven by another and was arrested following a high-speed car-chase in or around the Port Tunnel/Swords Road area of Dublin which ended when the vehicle collided with a taxi; (ii) after being stopped, Mr O'Brien was found in possession of a 'jimmy bar' and a screwdriver, each of which was discovered in the front-seat passenger foot-space; and (iii) subsequent to his arrest, Mr O'Brien was detained for questioning and gave details of (a) where he had been the evening previous to his arrest, (b) meeting up with the driver of the car that had been the subject of the high-speed car-chase, and (c) certain pills that he had consumed; he also made no response to a number of questions.

5. On 9th May, 2017, Mr O'Brien made application to Judge Martin Nolan of the Dublin Circuit Criminal Court, pursuant to s.4E of the Act of 1967, seeking to dismiss the charges against him on the basis that there was insufficient evidence of possession of the articles in question and/or intention on the part of Mr O'Brien to use the articles in the course of a theft. At the hearing of the s.4E application, the prosecution relied on the memorandum of interview taken while Mr O'Brien was detained for questioning, submitting,

inter alia, that “*The items themselves and the circumstances in which the incident took place and...the Garda stop that came to pass...are all matters that the intent can be inferred in relation to Mr O'Brien...when all of the facts are given to a court, to a jury as the case may be*”. At an early stage in the hearing of the s.4E application, the learned trial judge raised the issue of intent being capable of being inferred; and in ruling on the application he stated, *inter alia*, as follows:

*“I think there is a case for the Defendant to answer in this case. I think the mere fact of possession of implements of this type would give rise to an inference of wrongdoing. Obviously, there is a step...that the Prosecution must prove....It's for them, obviously, to do that...before a jury. But at this stage I am not going to accede to the application. It may [be] the case that when the matter is ventilated before a jury that the trial judge may give you a direction in the case...on the paucity of the evidence, but at this stage it is not apparent to me that I should give a 4E and therefore I'm not going to accede to the application.”*

6. So the learned Circuit Court judge refused the application made; Mr O'Brien now seeks judicial review of that decision.

#### **IV**

##### **Reliefs Now Sought**

7. By notice of motion of July 2017, Mr O'Brien seeks the following reliefs in the within application:

*i. An Order of Certiorari by way of an application for Judicial Review quashing the decision of the Dublin Circuit Criminal Court (His Honour Judge Martin Nolan) made on the 9th May 2017 refusing an application on behalf of the applicant herein to dismiss the charges in respect of which he was indicted under Section 4E of the Criminal Procedure Act, 1967, as inserted by Section 9 of the Criminal Justice Act, 1999 and as amended by Section 20 of the Criminal Justice Act 2006...*

*ii. An Order of Prohibition prohibiting the further prosecution of the applicant on foot of two charges contrary to section 15 of the Criminal Justice (Theft and Fraud Offences) Act 2001...set out on [identified] Charge Sheets...and comprised in Counts 9 and 10 of the indictment in [an identified] Dublin Circuit Court Bill...*

*iii. An Interim and/or Interlocutory Injunction and/or Stay preventing the further prosecution of the said charges until further Order...and/or the determination of this action...”,*

and certain ancillary reliefs.

#### **V**

##### **Fundamental Difficulty with Application Now Presenting**

8. Counsel for Mr O'Brien contends that there is a complete absence of evidence to suggest that the articles found in Mr O'Brien's possession (if they were in his possession and that requires to be proved and may never be proved) were in his possession with the intention that they be used in the course of a *future* theft, with such a prospective reading of s.15(1) of the Act of 2001 being, he contends, by reference to the decision of the Court of Appeal of England and Wales in *R. v. Ellames* [1974] 1 WLR 1391, the correct reading to bring to bear. He may or may not be right in his reading of s.15(1); he certainly argued the point most persuasively. But he, or rather his client, is faced with the insurmountable obstacle that the foregoing is not an issue which the court can properly adjudicate upon at this time. As Lord Brightman noted in his renowned observations in *R. v. Chief Constable of North Wales Police*, ex. p. *Evans* [1982] 1 W.L.R. 1155, 1173, “Judicial review is concerned, not with the decision, but with the decision-making process”, and on a related note, at 1174, “*Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.*” What Mr O'Brien seeks of the court in the within application is that it depart from that most fundamental notion of judicial review and function, in effect, as a court of appeal. Although Kearns P., it is true, in *Brohoon v. Ireland* [2011] 2 I.R. 639, 648, points to judicial review as one of the, in truth abundant, avenues of relief available to an aggrieved accused, that observation comes subject to the overriding constraint identified, *inter alia*, in *Evans*, i.e. it is not a recognition by Kearns P. of a right of effective appeal by way of judicial review. Additionally, the court does not see that in abandoning the old preliminary examination process, and establishing the present s.4E process, it necessarily or otherwise follows as a matter of logic that the Oireachtas intended that s.4E applications, unlike determinations under the old process, should be capable of being upset by judicial review. The court is further buttressed in the foregoing conclusions by the fact that: (i) when Mr O'Brien's case goes to trial, the trial judge will have a duty, *inter alia*, to protect fair process and to make such orders as seem to her or him to be necessary during the trial; (ii) Mr O'Brien will be able at trial to make an application for a direction of no case to answer; and (iii) Mr O'Brien, if convicted, will have the right to bring an appeal against conviction without the leave of the trial court.

#### **VI**

##### **Conclusion**

9. For the reasons aforesaid, the court respectfully refuses the various reliefs sought by way of the within application.