

THE HIGH COURT

[2017 No. 606 J.R.]

BETWEEN

GARETH HILL

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr Justice Binchy delivered on the 24th day of April, 2018

1. Is it permissible for a Circuit Judge to adjourn sentencing in respect of offences to which an accused person has pleaded guilty, pending the determination of earlier charges to which the same accused has pleaded not guilty? That is the question posed to the Court by these proceedings. It arises specifically in the context that the accused was on bail pending trial in respect of the first charges, when arrested and charged in connection with the second charges.

Background

2. The applicant is awaiting trial in connection with offences which he is alleged to have committed in August, 2016 (the "2016 charges"). These offences allege, *inter alia*, that the applicant had in his possession certain drugs with intent to supply contrary to ss. 3, 15 and 15A of the Misuse of Drugs Act 1977 as amended (the "MDA"). The applicant first came before the Circuit Court on 27th February, 2017, when the case was adjourned to the May sittings of the Circuit Court. The applicant sought a trial date which was initially fixed for 24th May, however, prior to that date the applicant issued a motion seeking to transfer his trial to Dublin. That application was refused on 27th June and the matter was adjourned to 23rd October, 2017.

3. In January, 2017, whilst on bail in connection with the 2016 charges, the applicant was found to be in possession of cannabis, cocaine and diamorphine. Further charges of possession with intent to supply were preferred (the "2017 charges"). He was arrested on 12th January, 2017. On this occasion he was refused bail and was remanded on custody.

4. According to an affidavit sworn by his solicitor, Mr Frank Buttimer, in these proceedings, the applicant through his solicitors confirmed to Cork District Court on 8th May, 2017 that he wished to sign pleas of guilty in relation to the 2017 charges. Mr Buttimer avers the applicant was not permitted to sign pleas of guilty on that date as the prosecution was awaiting directions from the respondent.

5. The applicant subsequently signed pleas of guilty on 24th May, 2017 at Cork District Court and he was then returned to Cork Circuit Criminal Court on 26th May, 2017 when he affirmed his pleas. His counsel on that date requested the Court to proceed immediately to sentencing in respect of the 2017 charges, and preferably on that date.

6. Mr Buttimer avers that the court was willing to proceed with sentencing, but the respondent then objected and applied to have the 2017 charges adjourned to 3rd November, 2017 in order to enable the applicant to be tried in the meantime in respect of 2016 charges. It was anticipated at that time that the trial of the 2016 charges would take place during the sittings of the Circuit Court in Cork sometime between 23rd October, 2017 and 24th November, 2017. The Court acceded to the application of the respondent.

7. All of the above is common case. It is also common case that the reason that the respondent made the application that it did on 26th May, 2017 is so that, when the Court is passing sentence in respect of the 2017 charges, it will have the benefit of knowing whether or not the applicant has been convicted in respect of the 2016 charges. In that event, and in the event that the applicant is convicted in connection with the 2016 charges, there are certain statutory consequences. Section 11 of the Criminal Justice Act 1984 as amended, provides:

"(1) Any sentence of imprisonment passed on a person for an offence -

(a) committed while on bail

(b) [not relevant]

Shall be consecutive on any sentence passed on him or her for a previous offence or, if he or she is sentenced in respect of two or more previous offences, and the sentence last due to expire

(4) Where a court -

(a) is determining the sentence to be imposed on a person for an offence committed while he or she was on bail, and

(b) is required by subsection (1) to impose two or more consecutive sentences,

then, the fact that the offence was committed while the person was on bail shall be treated for the purpose of determining the sentence as an aggravating factor and the court shall (except where the sentence for the previous offence is one of imprisonment for life or where the court considers that there are exceptional circumstances justifying its not doing so) impose a sentence that is greater than that which would have been imposed in the absence of such a factor."

8. On 24th July, 2017 the applicant applied, *ex parte*, and was granted leave to apply by way of an application for judicial review for the following reliefs:-

"(1) An order by way of *certiorari* quashing the decision of the learned trial judge made at Cork Circuit Criminal Court on 26th May, 2017 to adjourn the hearing of the sentence of the applicant on foot of signed pleas on Bill No. CYDP 158/2017 to the 3rd November, 2017.

(2) A declaration, by way of judicial review, that the existence of the charges against the applicant relating to Bill No. CYDP 83/2017, is not a valid ground for refusing to proceed to sentence the applicant irrespective of the signed pleas of guilty on the charges relating to Bill No. CYDP 158/2017.

(3) If necessary, a declaration by way of judicial review that the provisions of s. 11 of the Criminal Justice Act 1984 do not authorise delaying a sentence for an offence committed whilst on bail on criminal charges alleging the commission of irrelevant previous offence within the meaning of the said statutory provision, in order to ascertain if the person being sentenced in fact committed a relevant previous offence.

(4) If necessary, a stay on the proceedings on foot of Bill No. CYDP 83/2017 against the applicant pending the final determination of the within proceedings."

(5) – (7) not relevant to this application.

9. The order of Heneghan J. of 24th July, 2017 records a stay on the "said proceedings herein before referred to" up to 17th October, 2017, or until further order or until the stay of proceedings shall have lapsed by reason of the failure of the applicant to serve an originating notice of motion with the proper time. It would appear that the stay must relate both to the trial of the 2016 charges and the sentence hearing relating to the 2017 charges. That stay was continued by a further order made by Noonan J. on 9th November, 2017.

10. The remand order made by the Circuit Judge on 26th May, 2017, expired on 3rd November, 2017, but further remand orders have been made in the meantime with the applicant's consent. In their submissions, counsel for the applicant accept that the first relief sought is "somewhat moot" in light of the further remand orders. Nonetheless they contend that the first relief should be granted and I return below to their submissions in this regard.

11. Finally, as mentioned above, the applicant has consented, since the expiration of the impugned order remanding him in custody until 3rd November, 2017 to his ongoing detention until such time as these judicial review proceedings have been concluded. He did so expressly in an affidavit sworn by him on 6th November, 2017 for the purpose of an application for an ongoing stay of the trial of the 2016 charges, also pending the determination of these proceedings.

Submissions of the Parties

Submissions of the Applicant

12. Counsel on behalf of the applicant submits that the trial judge adjourned sentencing in respect of the 2017 charges for one reason only i.e. to facilitate the determination of the 2016 charges so that the outcome of those proceedings would be known at the time of handing down sentence in connection with the 2017 charges. It is submitted that this was not a valid ground upon which to adjourn the 2017 charges, in circumstances where the applicant had clearly indicated that he was maintaining his innocence in respect of those charges, and proceeding to trial before a jury. In so doing, it is the submission of the applicant that his presumption of innocence in respect of the 2016 charges has been breached. It is submitted that the applicant is entitled to the presumption of innocence in respect of the 2016 charges and that if that presumption is to mean anything, then he is entitled to be dealt with in respect of entirely separate and discrete matters in a way which is consistent with the application of a presumption of innocence relating to other matters.

13. That is the kernel of the applicant's case. The applicant also points to the fact that s. 11 of the Criminal Justice Act 1984 does not contain any express provisions permitting a sentencing court to adjourn a sentence hearing pending the determination of other matters. Accordingly s. 11 itself does not in any way infringe the presumption of innocence, nor does it mandate or permit a sentencing court to do so.

14. There is no specific decision of the Superior Courts in regard to this issue. However, the applicant relies upon a recent decision of Ní Raifeartaigh J. in a case of *Gifford v. Director of Public Prosecutions* [2017] IEHC 423. In that case, the applicant was charged with theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001 (the "Act of 2001"). The DPP had directed summary disposal of the charge. The District Judge asked for a list of the applicant's previous convictions. At this stage there was no plea of guilty or any indication on the part of the accused that she might plead guilty. Upon hearing of the applicant's previous convictions, the District Judge declined jurisdiction and in doing so he also made a remark which was reported in a local newspaper: "the party is over, it's five years in the Circuit Court."

15. The question for the Court in the judicial review proceedings was: "can a District Judge take previous convictions into account when deciding the mode of trial (summary or on indictment), in circumstances where either there is to be a trial, or at least there has not at that point been any guilty plea or indication of an intention to enter the guilty plea, by an adult accused?" This question in turn engaged the presumption of innocence. As in this case, there was no previous authority on the question posed, and nor did the statute under consideration i.e. the Act of 2001 explicitly address the question of whether previous convictions may be taken into account when a District Judge is exercising the function of deciding whether or not a case is a minor one fit to be tried summarily under s. 53 of that Act. Ní Raifeartaigh J. took the view that:-

"The case falls to be decided on whether the statute contains an implicit permission to take previous record into account, or whether, on the principle of the presumption of constitutionality described in *East Donegal Co-operative Livestock Mart Ltd. and Ors v. The Attorney General* [1970] 1 I.R. 317, the statute should be read as not permitting this by reason of the constitutional principle of the presumption of innocence. If the latter is the correct position, then it would follow that the District Judge in the present case breached a principle of constitutional justice, and took into account an irrelevant consideration or received inadmissible evidence, when making the decision as to mode of trial."

16. In the event, Ní Raifeartaigh J. concluded that the latter was the correct answer to the question posed. In coming to this conclusion she said:-

"It is true that the judicial oath taken by the District Judge could afford protection to a degree against potential prejudice to an accused, as would the 'fade factor' or potential reporting restrictions if the case is sent forward for trial on indictment. However, an even greater protection and the one giving the fullest effect to the presumption of innocence is

that the previous convictions not be referred to at all before the decision on jurisdiction is made or before an accused person has indicated or entered a plea of guilty or not guilty. In the absence of explicit statutory authority allowing for evidence of previous convictions being given at the pre-trial phase for the purpose of determining jurisdiction, I do not see why the 2001 Act should be interpreted as affording the weaker rather than the greater protection for the presumption of innocence."

17. It is submitted that the same reasoning set forth in *Gifford* applies in this case. The applicant is entitled to the presumption of innocence in relation to the 2016 charges. The provisions of s. 11 of the Criminal Justice Act 1984 are penal in nature and may result in the applicant having imposed upon him a much more significant sentence than might otherwise be imposed by a sentencing court, if the 2016 charges are first determined, and result in the conviction of the applicant.

18. The applicant also places reliance on his right to an expeditious trial, to include sentencing, in accordance with law. In this regard the applicant relies upon decision of O'Neill J. in the case of *Olafusi v. Governor of Cloverhill* [2009] IEHC 558. In that case there was a difficulty with the identification of the defendant. The District Judge did not wish to deal with the charges as long as there was doubt about his identity. She remanded the accused in custody to a later date, following upon which the applicant applied for and was granted an application for an inquiry into his detention pursuant to Article 40.4.2 of the Constitution. The applicant was successful and the Court directed his release. O'Neill J. concluded as follows:

"It may well be the case that difficulties are encountered in the identification of people who are found not to have normal proof of identification, but, be that as it may, the criminal justice process cannot be used or adapted to facilitate the ascertainment of the identity of such a person. Where such a person offers a plea of guilty the Court must, in the absence of appropriate exceptional circumstances, proceed to sentence. Insofar as there are difficulties encountered in establishing the identity of persons, this is a matter to be resolved by the immigration authorities and the Gardaí."

19. It is further submitted on behalf of the applicant the learned trial judge erred in law in taking into account a matter which he was not entitled to take into account when adjourning the sentencing hearing on 26th May, 2017 and that in doing so he infringed the applicant's presumption of innocence with regard to other matters and that in those circumstances he is entitled to the reliefs sought in the notice of motion.

20. Finally, the applicant also made submissions as regards the respondent's argument that the first relief sought is now moot in view of the fact that the order of the Circuit Judge of 26th May, 2017 is spent. While acknowledging that this is so, the applicant submits that it is established that the courts may in certain circumstances quash an order which is spent and no longer has practical effect and in this regard the applicant relies upon the decision of the Supreme Court in *Howard v. Early* [unreported, Supreme Court, 4th July, 2000] and the more recent decision of the Court of Appeal in *Connors v. Governor of Limerick Prison* [2017] IECA 218. In the former case Denham J. (as she then was) found that the impugned order was flawed and that there had been a failure to proceed in accordance with law which had consequences, some of which were spent, but there were also continuing consequences of relevance to the appellant. In *Connors*, the Court of Appeal considered that while the specific issue raised was moot, the issue was one that was "capable of repetition, yet evading review", a recognised exception to the doctrine of the mootness. In this case, it is submitted on behalf of the applicant that the effects of the original remand order had continued because the applicant continues to be affected by the order of the Circuit Judge, in that he still has not been sentenced in respect of the 2017 charges.

Submissions of the Respondent

21. The respondent submits that there is no basis for the applicant's contention that the presumption of his innocence has been breached. Nothing was either said or done by the Circuit Judge that might imply guilt on the part of the applicant as regards the 2016 charges. The applicant has already pleaded guilty to the 2017 charges, and so the presumption of innocence does not arise as regards those charges. The Circuit Judge did not refuse to accept the applicant's plea and his decision to adjourn sentence has not in any way intruded on the presumption of innocence.

22. It is submitted that there is no express requirement in s. 11 of the Criminal Justice Act 1984, or elsewhere, that mandates the immediate imposition of sentence and nor is there any basis upon which such a requirement may be inferred. Sentencing is often deferred, more often or not to facilitate a convicted person to enable him/her, for example, to procure reports that might in some way guide the judge in a manner favourable to the convicted person, when handing down sentence. It is submitted that it was open to the Circuit Court in this instance to await the outcome of the trial of the applicant on the 2016 charges before determining the appropriate sentence for the 2017 charges. The adjournment reflects the legislative intent as set out in s.11 of the Act of 1984. The adjournment was also entirely consistent with the totality and proportionality principles of sentencing and it was appropriate and *intra vires* the Circuit Judge to await the outcome of the trial of the 2016 charges.

23. There has been no diminution in the presumption of the applicant's innocence as regards the 2016 charges. Nor has he suffered any prejudice because he is already in custody in respect of those charges and any sentence that is ultimately imposed for the 2017 charges can have regard to the time that he has spent on remand while awaiting trial/sentence. Nor has there been any prosecution delay. The applicant himself caused some delay when applying to transfer his trial from Cork to Dublin in May, 2017 and it is submitted that that application, coupled with his request to be sentenced immediately on the 2017 charges, in May, 2017, might reasonably be seen as a strategic twin prong decision to avoid the consequences of being convicted of an offence while on bail, as provided for in s. 11 of the Act of 1984.

24. Moreover, the applicant himself applied, successfully, for a stay of his trial on the 2016 charges pending the outcome of these proceedings, and in the course of that application stated that he was satisfied to remain in custody pending the determination of this judicial review. But for the applicant's own interventions, it is submitted, the trial of the 2016 charges would most probably have concluded at latest by November, 2017. Accordingly, the applicant is not entitled to rely on such authorities as he does in relation to the right to an expeditious trial.

25. The respondent also contends that the principal reliefs sought by the applicant i.e. an order quashing the remand order made by the Circuit Judge on 26th May, 2017 became moot upon the expiration of that order. It is submitted that the case of *Howard v. Early* is largely confined to its most unusual facts (because in that case the applicant was held on remand in connection with an offence which carried no custodial sentence) and that in the case of *Barry v. Fitzpatrick* [1996] 1 IRLM 512 the Supreme Court categorically held that *certiorari* did not lie, even in circumstances where (unlike, it is submitted, in this case) the impugned order was made in excess of jurisdiction. In that case Hamilton C.J. stated:-

"[The High Court Judge] was quite correct in holding that an order of *certiorari*, if granted, would have no effect in quashing an order which was already spent and would be a pointless exercise".

26. The respondent also relies upon the related cases of *Joyce v. Watkin* and *Clinton v. Brady* [2007] 3 I.R. 510 in which Clarke J. (as he then was) refused the certiorari and declaratory orders sought on grounds of futility. It is submitted that the case of *Connors* relied upon by the applicant is not on point and, in any event was not concerned with relief by way of judicial review.

27. The respondent argues that the applicant's sentence hearing was deferred on the basis of relevant considerations (having regard to s. 11 of the Act of 1984) and that the Circuit Judge, in adjourning the sentence hearing, was acting *intra vires* and therefore that judicial review does not lie. The applicant continues to enjoy the full benefit of the presumption of innocence in relation to the 2016 charges and if he is acquitted there will be no consecutive sentence arising out of his conviction irrespective of the 2017 charges. By these proceedings the applicant is attempting to manipulate the process to insulate himself from the prospect of the consecutive sentencing regime mandated by statute.

Discussion and Decision

28. In their written submissions, counsel for the applicant state that "the presumption of innocence is a constitutional presumption and is so well known to this Honourable Court that no authority requires to be cited with regard to same." That is so is beyond any doubt but having regard to the application of the presumption as contended for on behalf of the applicant in these proceedings, it is desirable to reflect on the underlying purpose of the presumption, and its application in criminal trials. The presumption is centuries old and in the context of English law was most famously described by Lord Sankey in *Woolmington v. DPP* [1935] A.C. 462 as follows:-

"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is duty of the prosecution to prove the prisoner's guilt"

29. In the Irish context, the principle enjoys constitutional status, constituting as it does an essential if not overarching ingredient in the right to a fair trial guaranteed by Article 38.1 of the Constitution. In *the People (A.G.) v. O'Callaghan* [1966] I.R. 501 the Supreme Court stated that the courts owe more than verbal respect to the principle, it being "... a very real thing ...". Its principal purpose is to avoid the conviction of innocent persons. Its importance to the proper administration of justice cannot be underestimated and the courts must be vigilant to measures or practices that have the effect of abrogating the right altogether or intruding upon it to such an extent that its value is diminished, not least because such measures or practices may not always be obvious.

30. What is clear however is that the right is one enjoyed by an accused person in the defence of specific criminal charges. If that appears to be stating the obvious I make the point because of the context in which the right is asserted in these proceedings. Two points need to be made in this regard. The first is that the applicant makes no complaint at all about s. 11 of the Act of 1984. His complaint is about the decision of the Circuit judge to adjourn sentencing in connection with the 2017 charges. The second and more substantive point is that the applicant is not arguing that he will not receive a fair trial in respect of the 2016 charges. As to the 2017 charges, he has already pleaded guilty and the question of a fair trial does not arise. In *the State (O'Hagan) v. Delap* [1982] 1 I.R. 213, O'Hanlon J. noted that "the presumption of innocence ceased to apply to the prosecutor [the accused in the District Court] when he indicated his intention to plead guilty to both sets of offences". That this is so can hardly be in dispute. The presumption is a protection against conviction; once convicted, whether on foot of a plea or following a trial, the status of an accused person changes from being that of an accused to that of a convicted person and the presumption of innocence on the charges concerned is necessarily spent.

31. The applicant is not even attempting to argue in these proceedings that he will not receive a fair trial as regards the 2016 charges and the issue does not arise at all in relation to the 2017 charges, he having entered a plea to the latter. Thus it is apparent that the applicant's argument in this case is, in effect, for an extension of the presumption of innocence – that the presumption that he enjoys in relation to the 2016 charges should carry across to the manner in which the court treats with sentencing in relation to the 2017 charges. Put another way, if he was not facing the 2016 charges, he would have been sentenced in May, 2017 in respect of the 2017 charges and that it must therefore be the case that the Court is not according him the benefit of the presumption of innocence when it comes to sentencing the applicant in relation to the 2017 charges.

32. However, there is no authority for the proposition that the presumption of innocence should be applied in the manner asserted by the applicant in these proceedings. It is well established that the courts are entitled to organise their own business, including the allocation of dates for trials and the sequence in which trials are set down for hearing. It is entirely logical for a court to decide that matters should be determined in a chronological order. More than that, in organising the order of business it seems to me that it is also appropriate that the courts should have regard to such policies of the Oireachtas as are set down in legislation insofar as the manner in which the courts organise their business can do so. That is not to say of course that in doing so the courts should compromise in any way the constitutional rights of the citizen; it goes without saying that those rights must have priority. But insofar as the applicant is arguing that his constitutional right to the presumption of innocence has been breached by the decision of the Circuit Judge to adjourn sentencing on the 2017 charges, that simply is not so because he continues to enjoy the presumption in respect of the 2016 charges, and the presumption no longer arises as regards the 2017 charges.

33. I turn now to deal with the applicant's second argument, that the adjournment of sentence of the 2017 charges breaches his right to an expeditious trial. The first point I note in regard to this argument is that the applicant was himself responsible for the first adjournment of the trial of the 2016 charges, in applying as he did to have those charges transferred from Cork to Dublin. While he was entitled to make that application, it necessarily caused some delay. Secondly, the trial of the 2016 charges has been delayed since only on account of these proceedings, and has been stayed pending the determination of these proceedings on the application of the applicant himself. Thirdly, the applicant has consented to his remand in custody pending the outcome of these proceedings and his trial on the 2016 charges will assuredly take place without any appreciable delay upon the conclusion of these proceedings. For these reasons, I do not find the applicant's argument under this heading to be persuasive. I should add a cautionary note however; this is a finding on the facts of this case and it is not inconceivable that in another case a court could arrive at a different conclusion on this issue, if there was clearly going to be an unacceptable delay in the trial of the earlier charges.

34. In view of my conclusions in these issues, it is not necessary to address the arguments made on behalf of the respondent that the relief sought by the applicant is moot. The application must be dismissed in the light of the conclusions that I have already arrived at in relation to the applicant's own case.