Neutral Citation Number: [2011] IEHC 56

THE HIGH COURT

2010 58 JR

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

JUDGE HUNT

RESPONDENT

AND

CHRISTOPHER DOOLEY

(ALSO KNOWN AS CHRISTOPHER SMITH)

NOTICE PARTY

JUDGMENT of Mr. Justice McMahon delivered on the 18th day of February, 2011

1. The present case relates to the powers of a the District Judge to make a return for trial to the Circuit Criminal Court in the case of so called "hybrid offences".

The Facts

2. The notice party herein faces the following two charges:-

> Charge No. 1: A threat to kill or cause serious harm contrary to s. 5 of the Non-Fatal Offences Against the Person Act 1997. (A hybrid offence)
>
> Charge No. 2: A threat to cause criminal damage contrary to s. 3 of the Criminal Damage Act 1991. (A hybrid offence)

3. The charges relate to an incident alleged to have occurred on 3rd March, 2006. On 2nd April, 2007, it is maintained by the applicant that the Director of Public Prosecutions ("DPP") directed that the notice party be charged with the two offences and according to the applicant, he directed that they proceed by way of indictment. The DPP noted that the notice party was a juvenile and so indicated that the District Court had the power to retain jurisdiction under the Children Act 2001. It is alleged by the applicant that, as part of the direction, the DPP indicated that this should be conveyed orally to the court. (This is contested by the notice party – see *infra*)

4. On 3rd July, 2007, the District Court sent the notice party forward for trial and thereby declined the discretion it had under s. 75 of the Children Act 2001, to deal with the matter summarily.

5. On 19th January, 2010, the case was listed for trial before Dublin Circuit Criminal Court. Before the list was called, defence counsel indicated that it was making a point in relation to the decision of the Supreme Court in *Reade v. District Judge Reilly and the Director of Public Prosecutions* [2009] 2 I.L.R.M. 467. The case was then transferred to the respondent to determine this issue.

6. The notice party submitted that contrary to what is recorded *supra* at para. 3, the DPP had left the decision to the District Court in relation to jurisdiction and the District Judge had made the decision to send the notice party forward and according to the notice party the principles established in *Reade* applied. Counsel for the defence also alleged that in other cases in the Childrens' Court where this had occurred, the DPP was requesting that the matter be struck out so that charges could be brought again, implicitly acknowledging that the District Judge did not have the power to send the accused forward for trial in that case.

7. Opposing the submission in the Circuit Court, counsel for the prosecution distinguished the facts in the present case from those before the court in *Reade*: (i) in the *Reade* case, the DPP had elected for a summary trial and (ii) in the present case, the accused was a juvenile.

8. The respondent felt that he was bound by the *Reade* decision and that the District Judge had no statutory power to send the notice party forward for trial in the case of "hybrid offences". The respondent indicated that he was making no order in the case and that the notice party was free to go.

9. The above were the facts averred to by Ms. Susan Hudson, solicitor in the Office of the Chief Prosecution Solicitor.

10. Mr. John Quinn, solicitor, swore the affidavit for the notice party and did not disagree with the averments of Ms. Hudson save as to what happened before the District Judge. Mr. Quinn's version of what happened on that occasion was as follows:-

> "5. On the 15th of May 2007 Judge Smyth who was the presiding Judge considered jurisdiction in respect of the two charges. I say that the DPP's directions conveyed to the Court were that the matter of jurisdiction was a matter for the presiding Judge in the Children's Court to decide.
>
> 6. I say that Judge Smyth, having heard an outline of the facts from the prosecuting Garda, and considered jurisdiction under section 75 of the Children Act 2001, refused jurisdiction in respect of both charges, and remanded the case until the 26th of June 2007 for service of a book of evidence…
>
> 8. I say that on the 3rd of July, 2007 the book of evidence was served upon the Applicant and the presiding Judge, Judge

McCarthy sent the Applicant forward for trial to the present sittings of the Circuit Court."

11. Mr. Quinn agreed and recorded that the respondent decided that he was bound by *Reade*, which he said precluded the District Court from sending the notice party forward for trial and accordingly, there was no valid return for trial. Mr. Quinn confirmed that the respondent stated he had no power to make any further order in the matter.

12. Leave was granted by Peart J. on 25th January, 2010, to bring these judicial review proceedings wherein the DPP seeks the following reliefs:-

> (i) An order for *certiorari* quashing the decision made by the respondent on 19th January, 2010, to make no order in respect of the prosecution against the notice party.
>
> (ii) A declaration that the Circuit Court should deal with the matter on foot of the existing return for trial order.

The Law

13. In *Reade v. Reilly* [2009] 2 I.L.R.M. 467, the facts were that the DPP opted for a summary trial in the District Court in a situation where "hybrid offences" were involved. The District Court refused jurisdiction on the basis that, in its view, the matter was not a minor offence, and the District Judge sent the case forward to the Circuit Criminal Court for trial. The Supreme Court held that the only power the District Judge had in such a case was to strike out the case; the District Judge had no statutory power to send the accused forward for trial to the Circuit Criminal Court. The Supreme Court, however, indicated that the DPP could, of course, start again and bring fresh proceedings.

14. This case caused some confusion among practitioners and although a request was made to the Supreme Court for clarification, the Supreme Court stated that the *Reade* judgment stood in its existing terms and that no further clarification was appropriate or necessary.

15. The issue was raised again in the Supreme Court in *Gormley v. District Judge Smyth and the Director of Public Prosecutions* [2010] IESC 5 (Unreported, Supreme Court, 28th January, 2010). The judgment of the court was delivered by Geoghegan J. with whom Fennelly and Finnegan JJ. agreed. In that case, the facts were that the DPP had directed a trial on indictment, but the District Judge was erroneously told that the DPP had consented to a summary disposal of the matter. There was some confusion in the affidavits as to whether the DPP ever consented to a summary trial or whether the DPP "changed his mind" from an initial decision to have a summary trial to proceeding eventually by indictment. Geoghegan J., however, was prepared to hold that in either event the summary proceedings had come to an end when the District Judge finally sent the case forward to the Circuit Criminal Court for trial on indictment. Geoghegan J. held that the obligations of the District Judge would have been the same in either event and the breakdown in communication had no bearing on the legal principles to be applied.

16. Geoghegan J. said at pp. 11-12 of the judgment:-

> "I do not think that it makes any difference that the judge was erroneously told that the Director of Public Prosecutions had changed his mind. The legal obligations of the learned District Court judge would still be, as I have suggested above. Those obligations would be in conformity with the decision of this court in *Kelly v. The Director of Public Prosecutions* [1996] 2 I.R. 596. The judgment of the Supreme Court in that case was delivered by Murphy J. who held that where two procedures were available, one to prosecute summarily and the other to prosecute by way of indictment one might proceed to summary trial with the consent of the Director of Public Prosecutions. However the Director was in a position up until the applicant was acquitted or convicted, to reconsider his decision and to fall back on the indictable charge if he saw fit to do so provided that this power was not exercised in such a way as to constitute an abuse of the right of the defendant to a fair trial. Although the procedural context in which these principles arose in that particular case was somewhat different, the same principles would, in my view, equally apply on the facts of this case."

17. Referring to the jurisdictional argument, at pp. 18-22 Geoghegan J. said of the decision in *Reade*:-

> "There are a number of factors in the ***Reade*** case which radically and, in my opinion, relevantly differentiate it from this case. First of all in the ***Reade*** case the Director of Public Prosecutions had unequivocally directed a summary trial. The trial only became aborted because after changing his mind more than once the District Court judge decided that it was a non-minor offence. Secondly, there is no suggestion that the representative of the Director of Public Prosecutions was given any option or even to argue (*sic*) as to what was to happen. By that I mean there was no choice given to the Director of Public Prosecutions to either consent to the matter being sent forward for trial on indictment or on the other hand to request that the case be struck out with the option open to the Director to institute new proceedings. In this particular case, the Director directed a trial on indictment. Once that direction was given the District Court judge automatically had all the consequential procedural powers. One obvious feature of a hybrid offence is that the Oireachtas from the beginning contemplates there will definitely be a trial be it on indictment or summarily.
>
> Where the Director of Public Prosecutions has, as in this case and unlike the ***Reade*** case, directed a trial on indictment it makes no sense in my view to suggest that effectively the prosecution has to be struck out with no further order. That would be contrary to the intention of the Oireachtas. As O'Connor's Justice of the Peace points out and as was further underlined in the ***Report of the Working Group on the Jurisdiction of the Courts,*** jurisdiction to conduct a summary trial is statutory only. This undoubtedly means that the court does not have an inherent jurisdiction (though the exact meaning of that expression is none too clear). In my view, this does not mean that every act done by a District Court judge in the course of lawfully sitting in the District Court is unauthorised unless there is an express statutory provision permitting it. It is true he is confined to the statutory jurisdiction but in exercising that statutory jurisdiction there can be and are necessary inherent powers.
>
> There is no doubt that a purely statutory court such as the District Court has no inherent jurisdiction to conduct any form of criminal or civil litigation without express statutory authorisation. That proposition, which has always been accepted, does not mean that a judge of the District Court does not, in carrying out his or her function, has no (*sic*) inherent procedural powers which he or she is entitled to exercise.
>
> As I see it, the position was quite simple in this case. The relevant parts of section 4A of the Criminal Procedure Act, 1967 as inserted by section 9 of the Criminal Justice Act, 1999 read as follows:

'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 sub-section (1) without the consent of the prosecutor.'

The rest of the section is not particularly relevant to the issues on this appeal. Without even considering inherent powers, it would seem to me that the Oireachtas expressly told the judge of the District Court to do what he did. The appellant was 'before the District Court and charged with an indictable offence' in that the offence was capable of being tried on indictment. That being so, the judge was obliged to send the appellant forward for trial to the Circuit Court because none of the exempting conditions applied. The case was no longer being tried summarily even if it ever was validly tried summarily. The case was not being dealt with under section 13 of the 1967 Act and the appellant was not unfit to plead. I am not clear that there was any gap to be filled in the procedure so as to enable the judge to take the steps of sending the case forward for trial on indictment in slightly unusual circumstances, but if there is any argument that can be made to that effect, it would seem to me that the District Court judge clearly had the necessary implied or inherent powers. I do not think that the more elaborate setting out of powers in the 1951 Act for cases coming within that Act indicates any lack of powers on the part of the District Court judge in the particular circumstances of this case.

If a hybrid offence, therefore is before the court and it becomes clear that with the approval of the Director of Public Prosecutions it has to be tried upon indictment for whatever reason, I take the view that the judge will have the power to take the necessary steps to achieve that result (absent unfair procedures, oppression or abuse of process)."

18. More recently still, Kearns P. had to address this issue in *Dillon v. Judge McHugh, the Director of Public Prosecutions and the Judges of the Dublin Circuit Criminal Court* (Unreported, High Court, Kearns J., 14th January, 2011) where the facts were that the DPP opted for a summary hearing in the District Court when a "hybrid offence" was involved. The District Judge refused to hear it, not considering it a minor offence, and sent it forward for trial to the Circuit Criminal Court. The DPP then indicated by letter that he proposed to enter a *nolle prosequi*, presumably on the basis of the *Reade* decision. Subsequently, however, because of the *Gormley* decision, which was handed down shortly thereafter, he resiled from his earlier decision and indicated once more an intention to prosecute the accused on indictment having formed the view, that the return for trial was indeed valid in light of the decision in *Gormley*. In the judicial review proceedings that followed the accused (applicant) relied on *Reade*.

19. Kearns P. refused to hold, though invited to do so, that he had to make a choice between the *Reade* holding and the *Gormley* decision, partly because the Supreme Court in *Gormley* had distinguished the facts it had to deal with from those at issue in *Reade*. The offence at issue here was also a "hybrid offence" properly described by Kearns P. at p. 12 as "a most unfortunate term". (See also Geoghegan J. in *Gormley* (*supra*) at pp. 3 and 4. He refers to the preferred description in the James Committee in England where such offences are classified as "offences triable either way". The learned judge also refers to the English textbook, Smith and Hogan, *Criminal Law*, 8th Ed. (London, 2002)) Preferring to classify the facts before him as resembling more closely those of *Gormley*, Kearns P. stated at p. 18:-

"In the *Gormley* case a consent to summary disposal had erroneously been notified to the District Court Judge. That error was subsequently rectified. In the instant case it appears that while the Director initially sought summary disposal, he nonetheless later consented to the return for trial which was actually made."

20. The learned judge at pp. 18-19 emphasised the significance of ss. 4A(2) and (3) of the Criminal Procedure Act 1967:-

"…which specifically provide that an accused shall not be sent forward for trial under subsection (1) without the consent of the prosecutor and that where the prosecutor refuses to give the 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. That provision is important because it is the only scenario in which a striking out procedure is addressed by the section. It suggests to me that the section clearly does not mean that this course is obligatory in all circumstances where the District Court Judge declined jurisdiction but rather that it is mandatory only in the scenario expressly set out in the section."

21. It is noteworthy that these subsections were emphasised also by Geoghegan J. in *Gormley (supra).*

22. From the above case law, I conclude that the relevant legal propositions necessary for the resolution of the case before this Court are as follows. So called "hybrid offences" which have been created under statute can be dealt with either summarily or on indictment. Initially, it is for the DPP to decide whether the case is to be treated as a summary or an indictable offence. If the DPP decides it is to be prosecuted summarily, then the District Judge will deal with it as such unless he/she concludes that it is not "a minor offence". If, however, he or she determines that it is not "a minor offence", he or she must refuse jurisdiction. *Reade* held that in such circumstances, that is, where it was initiated as a summary offence, the District Judge cannot send it forward for trial to the Circuit Criminal Court. All he or she can do is strike out the proceedings. *Gormley*, however, held that where one has "a hybrid offence", the District Judge in the circumstances described, has an inherent power to make a return for trial where the offence is one which is capable of being tried on indictment, including "hybrid offences". Finally, *Reade* did not suggest that the District Judge could not validly return the accused for trial where the DPP decided to prosecute a hybrid offence as an indictable offence in the first instance.

23. Hybrid offences in the above sense must be distinguished from other offences which are created solely as indictable offences, either at common law or under statute, which under various statutory provisions can be tried in the District Court summarily. (These are referred to by Mr. McDermott in his submissions to the court as "non-hybrid indictable offences". See also Geoghegan J. in *Gormley* at p. 3.) We are not concerned here with such "non-hybrid indictable offences".

24. Bearing in mind the above legal principles, we must now address the facts of the present case.

Facts in the Present Case

25. There are two issues which must be determined in the present case at the outset:-

(i) Are the charges with which the notice party is charged "hybrid offences"? and;

(ii) did the DPP direct a summary trial or a trial by indictment?

There is no dispute in this case that the notice party faces charges which are "hybrid offences" as the term has been used earlier in this judgment. As to the second question, as already noted, there was a factual dispute between the parties as to what happened in the District Court before the matter was sent forward for trial. In his affidavit made on behalf of the notice party, Mr. John Quinn, solicitor, averred that the DPP's directions were that the matter of jurisdiction was a matter for the presiding judge in the Children Court and having heard an outline of the facts from the prosecuting garda the judge considered s. 75 of the Children Act 2001 before refusing jurisdiction in respect of both charges. Ms. Susan Hudson in her affidavit gives a very different version of events and at para. 6 of her first affidavit, she states:-

> "On 2 April 2007 the DPP directed that the Notice Party be charged with the two offences and that they proceed by way of indictment. The DPP noted that the Notice Party was a juvenile and so the District Court had the power to decide on jurisdiction. As part of the direction the DPP indicated his consent to the matter being returned or (sic) trial and directed that this should be conveyed orally to the court."

In the event, she said that having considered s. 75 of the Children Act 2001, which gave the District Judge power to deal summarily with the matter, the District Judge sent the notice party forward for trial.

26. Ms. Hudson made a second supplemental affidavit dated 23rd February, 2010, in which she exhibited copies of the orders of the court of 26th June, 2007, which clearly show on the face of them that the DPP elected for trial by indictment and that the District Court refused jurisdiction, presumably refusing to retain the case under s. 75 of the Children Act 2001.

27. Garda Stephen Boyce, the prosecuting officer in respect of the charges also swore an affidavit wherein he confirmed that he received directions from the DPP that the charges should proceed by way of indictment and that the DPP had noted that since the notice party was a juvenile, the District Court also had the power to decide on jurisdiction: "as part of the direction the DPP indicated his consent to the matter being returned or (*sic*) trial and directed that this should be conveyed orally to the court". Garda Boyce goes on at para. 8 to address the averment of Mr. Quinn in the following language:-

"8. I note that in paragraph 5 of his affidavit Mr. Quinn baldly states that 'the DPP's directions conveyed to the court were that the matter of jurisdiction was a matter for the presiding judge in the Children's Court to decide'. Saying this gives the impression that no DPP direction was conveyed to the court and it was told that it could do anything it wanted. I say that I clearly conveyed to the court the fact that the DPP had directed trial on indictment. I do not recall telling the court that jurisdiction was a matter for it. However, as the Notice Party was a minor, then the court had the power to decide on jurisdiction and so if either of the parties did tell the Court that it could decide on jurisdiction then that would have been an accurate statement of the position."

Garda Boyce goes on to reaffirm that he conveyed the DPP's directions to the court.

28. I resolve this factual matter in favour of the DPP for the following reasons:-

(i) The affidavits of Ms. Susan Hudson are supported by the affidavit of Garda Boyce who made clear averments of his instructions from the DPP and what he said to the District Judge on the day in question. Both averred that the DPP instructed that the trial be on indictment and that this was conveyed to the District Judge.

(ii) The District Court orders which were exhibited by Ms. Hudson, on their face show that the DPP elected for trial by indictment.

(iii) In his affidavit, Mr. Quinn acknowledges that the District Judge engaged with the terms of s. 75 of the Children Act 2001 before making his decision. Reading that section, one clearly sees that it only comes into play if the court has indictable offences before it. The section gives the District Judge jurisdiction to deal with the matter summarily if certain conditions are fulfilled. The whole purpose of the section is to give the District Judge some discretion to proceed summarily in the case of a child facing an indictable charge if circumstance warrant it. It is a jurisdiction which enables the District Judge to avoid sending the matter forward for trial in certain circumstances. Understandably, it only arises, however, if indictable offences are at issue in the first instance. The section could not be in play otherwise. If Mr. Quinn is correct when he said the DPP elected for a summary trial, then there would have been no reason or necessity for the District Judge to engage with the provisions of s. 75, something, however, which Mr. Quinn readily acknowledged happened. That he did so, as is acknowledged by Mr. Quinn, to my mind, shows that a trial by indictment was what was at issue on that day.

29. In those circumstances, from the case law outlined, the principle in *Gormley* applies. *Reade* has no application. It follows that when the District Judge in this case returned the notice party for trial by indictment on 3rd July, 2007, it was a valid return, and the respondent, when he refused to hear it, on the law as enunciated in *Reade*, was in error. For this reason, I will allow the application.

30. I make the following orders:-

(i) An order of *certiorari* quashing the decision made by the respondent on 19th January, 2010 to make no order in respect of the prosecution against the notice party.

(ii) A declaration that the Circuit Court should deal with the matter on foot of the existing return for trial order.

31. By way of postscript, it should be noted that the notice party in its written submissions urged the court to refuse the orders sought on the grounds that more appropriate alternative remedies were available to the applicant in this case. At para. 13 of its written submissions, counsel for the notice party puts this argument succinctly:-

> "Based on that authority [O'Neill J. in *Brady v. Judge Fulham and Director of Public Prosecutions* [2010] IEHC 99, (Unreported, High Court, 26th March, 2010)], it was always open to the DPP in this case to re-enter the prosecution. Alternatively, the Director could have started the prosecution afresh by arranging for the notice party to have been re-charged. Again, by proceeding in that fashion the delay that is inherent in judicial review applications, not to mention the additional cost, would have been avoided."

32. I have considered the notice party's argument on this ground and in particular, the recent authorities cited in its submissions: *Grodzicka v. Judge Ní Chonduin & Director of Public Prosecutions* [2009] IEHC 475 (Unreported, High Court, Dunne J., 30th October, 2009); *Doyle v. Judge Connellan & Director of Public Prosecutions* [2010] IEHC 287, (Unreported, High Court, Kearns P., 9th July, 2010) *etc*. I have some sympathy with the submission but, in this case the level of disquiet and uncertainty in the wake of the *Reade* and *Gormley* decisions warranted an application for a hearing by way of judicial review so that the matter could be further clarified. It should be noted that Kearns P.'s decision in *Dillon* had not been handed down when this case was argued before me and the element of clarification which the *Dillon* case brought was not available at that time. Since my decision is primarily based on the *Gormley* decision, however, I did not find it necessary to invite submissions from the parties on the *Dillon* judgment.

33. I reject the notice party's submission on this ground.