

THE HIGH COURT**JUDICIAL REVIEW****[2014 No. 356 JR]****BETWEEN****ANTHONY O CONNOR****APPLICANT****AND****DISTRICT JUDGE MICHAEL WALSH, THE DIRECTOR OF PUBLIC PROSECUTIONS IRELAND AND THE ATTORNEY GENERAL****RESPONDENTS****JUDGMENT of Mr. Justice McDermott delivered on 24th day of July, 2015**

1. On the 22nd January, 2014 the applicant appeared before the first named respondent in the Dublin Children Court following his arrest with two others, one of whom was a juvenile at the time of commission of the alleged offence. The applicant was charged with the offence of entering a building, 14 St. George's Avenue, Drumcondra as a trespasser and while there committing theft, an arrestable offence, contrary to section 12(1)(b) and (3) of the Criminal Justice Theft and Fraud Offences Act 2001. At the initial hearing evidence was given of arrest, charge and caution and a direction for summary disposal of the charge on a guilty plea in accordance with section 13(2) of the Criminal Procedure Act 1967 was indicated on behalf of the Director of Public Prosecutions.
2. On the 22nd January, Judge John O'Connor, then presiding, raised a concern about the delay which occurred between the date of the alleged commission of the offence, the first arrest of the applicant and his first court appearance. The applicant was granted bail and the case was remanded from time to time as set out in the timeline of events prepared and submitted to the Court in the course of these proceedings. The case was remanded to the 28th February, 2014 for the hearing of submissions on the issue of delay.
3. On the adjourned date Judge O'Connor found that as the applicant's co-accused, a minor, was being sent forward to the Circuit Court, the Children's Court no longer had jurisdiction in respect of the applicant's case as an adult. The matter was then adjourned to the 14th March, 2014 to Court Number 3 at the Criminal Courts of Justice for mention.
4. On that date counsel attended on behalf of the applicant and raised the issue of delay before the first named respondent. The matter was further adjourned to allow written submissions to be furnished to the Court on the question of whether the District Court had jurisdiction to determine a preliminary issue of delay when the Director of Public Prosecutions consented to summary disposal of the charge on a guilty plea pursuant to section 13 of the Criminal Procedure Act 1967.
5. On the 6th June, 2014 the first respondent received written and oral submissions in respect of the issue and adjourned the matter until the 10th June. The learned Judge determined that the Court did not have jurisdiction to hear a preliminary argument in respect of delay in the proceedings.
6. On the 30th June, 2014 leave to apply for judicial review seeking an order of *certiorari* and various declarations was granted to the applicant (Peart J.). The applicant sought to quash the order of the first named respondent made the 10th June and a declaration (*inter alia*) that the learned judge erred in law and acted contrary to natural and/or constitutional justice and/or in breach of the applicant's constitutional rights to trial in accordance with law under Article 38.1 and fair procedures under Article 40.3.1 of Bunreacht na hÉireann. It was also submitted that the learned judge erred in law in determining that he had no jurisdiction to hear and/or determine the preliminary issue of delay when the procedure under section 13(2) of the 1967 Act was invoked.

Chronology of Events

7. On the 3rd September, 2012 the applicant and two others were arrested and released without charge in respect of the burglary offence. On the same date, the applicant's fingerprints were taken and submitted to the Fingerprint Section, Garda Headquarters, Phoenix Park, Dublin. On the 10th September statements were sought from gardai involved in the investigation. On the 1st November statements were taken from the injured party who was then residing in Mayo. On the 12th December Garda O'Leary provided a statement in respect of the arrest of one of the accused. On the 29th December Garda Toncan provided a statement in respect of the arrest of the applicant. On 18th January, 2013 a fingerprint analysis report was issued by the Fingerprint Section. A statement was furnished by Sgt. Pdraig Moran (a scene of crime investigator) on the 22nd January, 2012. Garda Siobhan Murray provided a statement in relation to the three prisoners on the same date. Garda Griffin provided a statement in respect of the arrest of another of the co-accused on the 28th January. On the 15th February, 2013 a file was submitted for directions to Sgt. Bruce. On the 28th February Sgt. Bruce provided statements outlining the circumstances of the detention of the three prisoners under section 4 of the Criminal Justice Act 1984. The file was forwarded to the district officer on the 2nd March, 2013. It was forwarded to the Office of the Director of Public Prosecutions on the 21st March. Further statements were received in May and June 2013. Following contact between Inspector Gallagher and the Director of Public Prosecutions in August 2013 a direction issued to charge one of the co-accused but this was not to proceed until a direction was received in respect of the applicant.
8. A number of queries were raised by the Director of Public Prosecutions in relation to the report from the Fingerprint Section which were addressed in the period between September and November, 2013. On the 23rd December, 2013 a direction was received to charge Anthony O'Connor under section 12 and he was thereafter arrested on the 2nd January, 2014 and released on bail to appear at the Children's Court 55 on the 22nd January, 2014.

Section 13(2) Criminal Procedure Act, 1967

9. A condition precedent to the assumption of jurisdiction by the District Court in respect of the charge of a burglary offence which is indictable under s.13 of the Criminal Procedure Act 1967 is that the Director of Public Prosecutions must furnish a consent to the summary disposal of the charge. The Director in this case gave her consent provided the applicant was willing to plead guilty. Section

13 as amended by section 10 of the Criminal Justice Act 1999 provides the statutory basis for the vesting of jurisdiction in this matter in the District Court. It provides insofar as it is relevant to these proceedings:-

"If at any time the District Court ascertains that a person charged with an offence to which this section applies wishes to plead guilty and the court is satisfied that he understands the nature of the offence and the facts alleged, the Court—

(a) may, with the consent of the prosecutor, deal with the offence summarily, in which case the accused shall be liable to the penalties provided for in subsection (3)...

(3)(a) On conviction by the District Court for an offence dealt with summarily under subsection 2(a), the accused shall be liable to a class A fine within the meaning of part 2 of the Fines Act 2010 or, at the discretion of the court, to imprisonment for a term not exceeding 12 months, or to both such fine and imprisonment."

10. Section 76 of the Children Act 2001 provides that when a child and an adult are jointly charged with an indictable offence, the Children Court shall deal with the child in accordance with section 75 and with the adult "in accordance with the enactments governing proceedings in the District Court against a person charged with an indictable offence". These enactments include the Criminal Justice Act 1951 which permits the summary trial of certain indictable offences including offences under the Criminal Justice (Theft and Fraud Offences) Act 2001.

11. The District Court may deal with any indictable offence provided the particular offence is minor in nature. Section 13(2) applies to any indictable offence to which the accused is willing to plead guilty. This case was transferred from the Children Court to the District Court under the provisions of the Children Act 2001. The District Court then had jurisdiction under section 53 of the 2001 Act to conduct a summary trial in relation to an indictable offence if the court was of the opinion that the facts proved or alleged constituted a minor offence fit to be tried summarily, the accused on being informed by the Court of a right to be tried with a jury did not object to being tried summarily, and the Director of the Public Prosecution consented to the accused being tried summarily for the offence. The penalty in respect of such a trial is similarly limited to a class A fine or imprisonment for a term not exceeding twelve months or both. No trial could take place of the charge laid in this case in the District Court without the consent of the Director of Public Prosecution to summary disposal.

12. The Director of Public Prosecutions did not consent to the applicant being tried summarily but consented to the exercise of the more limited form of jurisdiction exercisable in respect of the applicant if he were to plead guilty to the offence in the District Court. In that event the applicant would be subject to the penalties referred to in subsection (3). The consent is not operative unless the accused indicates that he is willing to plead guilty.

13. There is no jurisdiction vested in the District Court to deal with the offence summarily unless these conditions precedent are met. Otherwise, the matter must proceed to the Circuit Criminal Court pursuant to section 4A of the Criminal Justice Act 1999. It provides that when an accused 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 the case is being tried summarily or is dealt with under section 13 of the 1967 Act or the accused is unfit to plead. The accused may not be sent forward for trial without the consent of the Director.

14. The jurisdiction of the District Court to deal with indictable offences is defined by these statutory provisions.

15. The operation of section 13(2) was considered in *TH v. the Director of Public Prosecutions and others* [2004] IEHC 76 in which the learned judge stated:

"31... Under this provision there are again a number of matters which must exist before the District Court has jurisdiction to consider disposing of a case in a summary manner. Firstly, the accused must wish to plead guilty to the offence with which he stands charged before that Court. Secondly, he must understand the nature of the offence and the facts alleged and, thirdly, the DPP must consent to the case being disposed of summarily. If these conditions are met then the Court may deal with the matter summarily, though there is no mandatory obligation to do so. It may be, depending on the judge's view of the facts, that the accused is sent forward with his plea of guilty to the next appropriate sentencing court. Disregarding for a moment how one should ascertain the wishes and understanding of the accused person, it is in my view abundantly clear from s. 13(2) that an essential precondition to the District Court having jurisdiction to dispose of the offence summarily, is that, in respect thereof, the defendant pleads guilty. In the absence of that plea and even though the other requirements are satisfied, this subsection simply cannot be used ... there is no scope to add to or excise from these said requirements."

16. McKechnie J. also considered the nature of the jurisdiction conferred by section 13(2) on the District Court. He stated that the Court was entrusted with the obligation to manage the operation of section 13(2) and in that context to "ascertain" (meaning "to find out with certainty") whether the accused wished to plead guilty. He rejected the submission that a District Judge could not inquire of an accused, of his own volition, as to what his intentions might be under section 13(2). The accused could also indicate of his own volition that he wished to plead guilty. There was nothing objectionable in permitting the Director of Public Prosecutions to indicate her view as to whether she would consent or not to disposal on a guilty plea in the District Court. If the invocation of the section were to be used for any unlawful or illegal purpose, such as the making of an inducement or the issuing of a threat against an accused by the prosecuting authorities, the learned judge stated that "the available law and the District Court are well capable of scrutinising such circumstances and dealing with those if the same should arise". He noted that the provision was a valuable one entirely consistent with constitutional justice and was very frequently used to the distinct advantage of an accused person. On appeal to the Supreme Court Fennelly J. stated:

"37 ... the applicant submits that it is not open to the appellant to have the applicant asked in the District Court how he pleads to an indictable offence.... He says that the effect is an inducement, coupled with a threat, to plead guilty which is unlawful. He submits that only the accused may initiate the plea procedure pursuant to section 13 of the 1967 Act. The Director may not indicate his attitude in advance and the District Court Judge may not inquire of the accused whether he wishes to plead guilty. In my view, the application was unmeritorious for all the reasons so comprehensively set out in the judgment of the learned trial judge. I can see no objection whatever to the District Court ascertaining whether an accused wishes to plead guilty, though a Judge must be very careful not to appear to put any pressure on him or her to do so. I would add that, in the actual circumstances of this case, the applicant's complaint was especially lacking in the slightest merit. The applicant was well represented by solicitor and counsel. It is patent from the entire history of the matter over several lengthy hearings in the District Court that he had the benefit of their advice. There was, therefore, no question whatever of his being oppressed or induced by the appellant to plead guilty if he did not want to do so."

17. It was submitted that the District Court may consider the issue of delay prior to the entering of a plea in respect of an indictable offence under section 13(2) because the initiation and conduct of criminal proceedings before the District Court are subject to the normal rules which apply in respect of trial in accordance with law and fair procedures. Thus it is submitted that the issue of delay may be considered by the District Court in advance of the fulfilment of the conditions set out under section 13(2).

18. In this case the applicant has not indicated a willingness to plead guilty which is a condition precedent to the exercise of the jurisdiction. There cannot be a summary disposal of the case unless that indication is given. The Director of Public Prosecutions has given her consent to summary disposal. The District Court cannot exercise the jurisdiction unless satisfied that these two preliminary conditions have been met at which stage the Court "may" deal with the case summarily, though it is not obliged to do so. As matters stand this case cannot be disposed of in the District Court under section 13(2). The only trial that may take place in accordance with law is a trial on indictment in the Circuit Court.

19. There is no doubt that a District Judge may be called upon to determine issues concerning the protection or observance of an accused's constitutional rights in the course of a summary trial and in particular, to ensure that the trial is conducted in accordance with the fundamental fairness required by article 38.1 and article 40.3. For example, Hogan J. in *BG v. Judge Murphy* (1) [2011] IEHC 359 and *BG v. Judge Murphy* (2) [2011] 3 I.R. 748 upheld the validity of a District Court order sending the accused forward to the Circuit Court for the determination of whether he was fit to plead because the provisions of section 4(3)(a) of the Criminal Law (Insanity) Act 2006 did not allow for the determination of that issue in the course of the section 13(2) procedure. The learned District Judge was concerned that the accused might not understand the nature of the offence laid against him as required under section 13(2) before she could exercise jurisdiction and his fitness to plead needed to be assessed. The District Court's jurisdiction as defined by section 4(3)(a) only allowed for the determination of the fitness to plead of an accused who was charged with a summary offence or an indictable offence triable summarily. The difficulty was that an accused dealt with under section 13(2) was excluded from the application of section 4(3)(a). Hogan J. noted in *BG*(1) that:

"12. The applicant has not, of course, been charged with a summary offence. He was rather charged with an indictable offence which could only be tried summarily provided he pleaded guilty and provided also that the District Judge was satisfied that he understood the nature of the offence and the facts alleged. But these essential statutory pre-conditions to the exercise of that jurisdiction are not - as yet, at least - in place in the present case. It cannot therefore be said that the offence in question "is being or is to be tried summarily", since without these pre-conditions being satisfied, the offence will never be tried summarily."

The learned judge concluded that section 4(3)(a) did not apply and that the District Court was correct to send *BG* forward to the Circuit Court for the determination of fitness to plead as a matter of constitutional fairness. The learned judge therefore granted a declaration in *BG*(2) to remedy this inequality. Having upheld the order of the District Court a declaration was made that if the accused were found fit to be tried by a judge of the Circuit Court in accordance with section 4(4) of the 2006 Act and thereafter pleaded guilty to the charge, the sentencing judge ought to apply a maximum sentence of no more than the equivalent sentence that would have been available had the matter being disposed of under section 13(2) of the 1967 Act. This is entirely distinguishable from the present case in which, I am satisfied no similar discrimination exists and where clear and well established remedies are available in respect of delay in criminal proceedings.

20. As explained by Hogan J. and McKechnie J. in *BG*(1) and *TH* respectively, the District Court does not have jurisdiction to deal with an indictable offence under section 13(2) unless the statutory criteria are fulfilled. This may only occur if the accused wishes to plead guilty and the Director of Public Prosecutions consents to summary disposal on that basis. There will never be a substantive trial in the District Court in respect of the charge. In pleading guilty the accused accepts the charge as laid against him beyond a reasonable doubt. He is submitting on an informed basis to the exercise of the District Court's sentencing jurisdiction. There can be no reality to a claim of prejudice in the conduct of a fair trial in those circumstances caused by reason of delay. The discrimination is entirely in his favour in that he is not to be subjected to the full rigours of the penalty that might otherwise apply following trial on indictment.

21. Since the applicant was never entitled to be tried summarily in the District Court, that Court never had jurisdiction to entertain an application in respect of delay. In this case, the applicant has full mental capacity, is legally advised, and is the only person in a position to know and determine whether it is appropriate that he should plead guilty to the offence with which he is charged. He may indicate his willingness to do so to the District Court in the knowledge that the consent of the Director of Public Prosecutions to summary disposal is available with the resulting benefit to him of a reduced exposure in terms of penalty.

22. It is said that since the District Court has jurisdiction to conduct criminal trials and an obligation to do so in accordance with article 38.1 and article 40.3, it has jurisdiction to protect the constitutional rights of the accused and in particular the right to trial with reasonable expedition (see *The State (Healy) v. Donoghue* [1976] I.R. 325; *The State (McEvitt) v. Delap* [1981] I.R. 125; *Director of Public Prosecutions v. Gary Doyle* [1994] I.R. 286; *The People (DPP) v. Lynch* [1982] I.R. 64 and *Whelan v. Kirby* [2005] 2 I.R. 30).

23. I am satisfied that, as held in *The State (O'Connell) v. Fawsitt* [1986] I.R. 362, a person facing summary trial in the District Court may raise the issue of delay before that Court. In such cases the same test applies as that applicable on the hearing of an application for an order of prohibition by way of judicial review in which it is claimed that the further prosecution of a person accused of an indictable offence ought to be restrained because of a real risk of an unfair trial due to delay. As stated by Kearns J. (as he then was) in *Cormack and Farrell v. Director of Public Prosecutions* [2009] 2 I.R. 208:

"48. In this context I see no basis for applying a separate legal regime to summary prosecutions than that which arises in the case of indictable offences. Obviously, however, it follows from everything already said that delay will more rapidly become blameworthy and delays of lesser magnitude will be seen as more likely to be intolerable where summary proceedings are concerned."

24. In the more recent decision of *Byrne v. Director of Public Prosecutions (Gardai Enright)* [2011] 1 I.R. 346 O'Donnell J. noted that the issue of delay in respect of criminal trials might be more appropriately dealt with in the court of trial which offered a speedier and cheaper avenue of relief than an application to the High Court for judicial review. It would permit the issue to be determined by a court which has extensive experience of similar trials and is vested with full constitutional jurisdiction, including the obligation to ensure a fair trial and vindicate the rights of accused persons. However, as accepted in the applicant's written submissions, these observations may be regarded as *obiter dicta* and the law remains as stated in the O'Connell case. As matters stand the only order that may be made by the District Court is to send the matter forward for trial to the Circuit Court in accordance with the provisions of section 4A. It follows that if the applicant in this case, who is charged with an indictable offence, wishes to prohibit his trial on the basis of a real risk to its fairness, he must do so by application for leave to apply for judicial review. I am satisfied that this offers a complete remedy to the applicant in respect of the alleged delay (see *P O'C -v- Director of Public Prosecutions* [2000] 3 I.R. 25 and *J*

O'C -v- Director of Public Prosecutions[2000]3 I.R.478). I do not consider that this remedy creates any unfairness or inequality or that it is incompatible with the provisions of the European Convention on Human Rights or the jurisprudence of the European Court of Human Rights (see Fennelly J. in *TH* above and *McFarlane v. Ireland* (application number 31333/06, 10th December, 2010) and *Barry v. Ireland* (application number 18273/04, 1st December, 2005)).

25. The evidence indicates that the investigation and prosecution of the charge against the applicant has been conducted within a reasonable timeframe to date. The period of sixteen months between the date of the alleged offence and the date upon which the applicant was first brought before the Court does not disclose a culpable degree of delay sufficient to justify the granting of relief by way of prohibition had such an application been brought. The applicant in such an application must establish that he has suffered prejudice as a result of culpable delay on the part of the prosecution. This may consist of unusual degrees of stress or anxiety, pre-trial detention, or some prejudice caused to the applicant in the preparation and presentation of his defence. There is no evidence to support the proposition that the applicant has suffered or is at risk of suffering any prejudice or disadvantage by reasons of the time taken to prosecute this case to date. I am satisfied that there is no merit in any proposed submission based on delay. Therefore, even if the applicant were correct in the submission that he had a right to have the issue of delay determined in advance of the operation of section 13(2) on the basis of a guilty plea, there is no evidence to suggest that such an application could possibly have succeeded, or indeed that such an application could succeed on an application for prohibition to the High Court, applying the appropriate test. I would therefore, have exercised the discretion of the Court and refused the relief claimed.

26. The application is dismissed.