

## THE HIGH COURT

Record Number: 2007 No.142 JR

BETWEEN

BRIAN CRANE

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS AND JUDGE MICHAEL WHITE

RESPONDENTS

**Judgment of Mr Justice Michael Peart delivered on the 26th day of April 2007**

1. The trial of the applicant on three charges under section 3 of the Non-Fatal Offences against the Person Act, 1997 ("the 1997 Act") has been adjourned pending the Court's decision on the point raised in these proceedings. I gave my decision refusing the relief sought at the conclusion of the submissions made by Counsel at the hearing on the 27th March 2007, and indicated that I would give my detailed reasons in a written judgment later.

2. The background to this application is that following a fracas in a public house on the 11th June 2003 the applicant was alleged to have assaulted three youths. He was later arrested and questioned by Gardai about the incident and a file was sent to the respondent for a decision on whether to prosecute the applicant could be made. According to the applicant's grounding affidavit he was subsequently summonsed to answer three charges, two of which were under Section 2 of the Act, and one under Section 3 thereof. These matters came before the District Court at Swords, Co. Dublin, and were adjourned from time to time until directions were received from the respondent in relation to the charge under Section 3 of the Act, as to whether this matter was being prosecuted by indictment or whether the respondent was consenting to summary disposal.

3. In the event, the District Judge in due course refused jurisdiction on the s.3 charge and sent the applicant forward to the Circuit Criminal Court for trial.

4. On or around the 6th March 2006 the matter came on for trial, but it appears that there was no Court available to hear the case and the trial was put back to the 6th February 2007. At this stage the applicant and his advisers were of the view that the only charge which the applicant was facing was one charge under s. 3 of the Act, the other two charges, being s. 2 charges, being summary offences, remaining before the District Court for disposal. The applicant's solicitor, A. Derek E. Burke has sworn in his grounding affidavit that at no time prior to the 6th March 2006 had he been made aware that the indictment sought to be introduced before the Court contained in fact three charges under s. 3 of the Act, and neither was he handed a copy of that indictment. He states also that the summonses in respect of the two summary offences under s. 2 of the Act were adjourned to a date after the s. 3 charge was expected to be concluded.

5. On the 6th February 2007, it became apparent that the indictment contained three charges under s. 3 of the Act. It was believed at that time that what had occurred was that the two summary offences under s. 2 of the Act had been in some way "converted" without any notice to the applicant or his advisers into two further indictable offences under s. 3 of the Act, so that he now faced three such charges. The matter was put back for one week so that the position could be clarified and considered by the applicant's advisers.

6. On the 12th February 2007, according to Mr Burke's affidavit the learned Circuit Judge was told at first that the summonses in the District Court had been struck out by that time, but in fact that appeared to be not so, and had been adjourned. Mr Burke also states that while it is conceded that the Director of Public Prosecutions may add charges to an indictment, such additions must be based on facts which are contained in the Book of Evidence served, but that the facts disclosed in the Book of Evidence do not suffice to ground the additional two charges.

7. Leave was granted to seek the reliefs sought in this application, and the trial restrained pending this Court's decision.

8. In an affidavit sworn by Patrick Geraghty, a solicitor in the Chief Prosecution Solicitor's office, it is denied that the applicant was taken by surprise in any way by finding on the date of trial that he was facing three rather than one charge under s. 3 of the Act. He avers that the application being made is misconceived and unfounded. He goes on to say that the indictment was at all times available for inspection by the applicant's lawyers, and that the practice is that the indictment itself is often not lodged until the date of an accused's arraignment or trial, but that if a copy is requested by the accused or his lawyers it is provided on request. In the present case no such request was received.

9. Mr Geraghty also states, for the sake of clarification, that at no time in this case was an indictment for just one offence prepared, and that the indictment at all times contained three such counts under s. 3 of the Act. He avers also that the decision by the DPP to include on the indictment charges in addition to that contained in the return for trial made by the District Judge is one that is validly made in accordance with S.4M of the Criminal Procedure Act, 1967, as inserted therein by s. 9 of the Criminal Justice Act, 1999). That section provides:

"4M.— Where the accused has been sent forward for trial in accordance with this Part, the indictment against the accused may include, either in substitution for or in addition to counts charging the offence for which he has been sent forward, any counts that –

(a) are founded on any of the documents served on the accused under section 4B or 4C, and

(b) may lawfully be joined in the same indictment."

10. The documents referred to in s. 4B of that Act include the Book of Evidence.

11. The Court was also informed that the summary charges have by now been struck out in the District Court.

12. I am satisfied from a perusal of the Book of Evidence that the facts on which the two added charges under s 3 of the Act are contained in statements contained in the Book of Evidence.

13. Alan Toal BL for the applicant has submitted that in this case what occurred should be seen not as the addition or substitution of charges on the indictment as is permitted under s. 4M of the 1967 Act, but rather as an impermissible conversion of s.2 summary

offences into indictable s. 3 offences. He submits that an accused person is entitled to certainty and that in the present case the accused at all times before February 2007 believed that he was facing just one s. 3 charge, whereas in fact, unknown to him, the indictment contained three such charges and that this ought not to be permitted.

14. Micheál P. O'Higgins BL submits that what occurred in this case is exactly what is permitted to happen by virtue of s. 4M of the 1967 Act, as set forth above, and that any application to strike out any charge on the indictment on the basis that the facts underlying any charge thereon is not apparent in the Book of Evidence is an application which may be made to the trial judge in the Circuit Court, and refers by way of example to s. 4E of the 1967 Act which provides, as relevant:

"4E.— (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.

(2) .....

(3) .....

(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."

15. As far as the accused being taken by surprise in any way in the present case, Mr O'Higgins submits that, in any event, the trial was adjourned and ample time was gained thereby for the altered situation to be addressed by his legal team. He submits that nothing precludes the DPP from adding the two other s. 3 charges to the indictment after the return for trial from the District Court.

16. I am satisfied that the addition of the two charges to the indictment is something which is permitted and that no unlawfulness has occurred. The facts grounding those charges are contained in the Book of Evidence served on the applicant. He has not established any basis on which to prohibit his trial on those two added charges and I refuse the reliefs sought.