Neutral Citation Number: [2009] IEHC 261

THE HIGH COURT

2008 1085 JR

MARK MURPHY

APPLICANT

AND

DISTRICT JUDGE WILLIAM EARLY

RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

JUDGMENT of O'Neill J. delivered the 26th day of May 2009.

1. **Relief sought**

1.1 On the 13th October, 2008, this Court (Peart J.) granted leave to the applicant to seek, *inter alia*, the following relief by way of judicial review:-

An order of *certiorari* quashing the order of the respondent sending the applicant forward for trial to the Circuit Court on five indictable offences and one summary charge.

2. **Facts**

2.1 The applicant was charged with eight offences on the 9th July, 2008, and was brought before Kilmainham District Court. Three two week remands were granted by the District Court (on the 10th July, 2008, on the 24th July, 2008, and on the 7th August, 2008) whilst awaiting the directions of the notice party. On the 21st August, 2008, the respondent made an order returning the applicant for trial in respect of six of the offences with which he had been charged. Five of the charges the subject of this order were indictable offences and comprised of the following: two offences contrary to s. 12(1) (b) and (3) of the Criminal Justice (Theft and Fraud Offences) Act 2001 ("the Act of 2001"); an offence contrary to s. 12(1) (a) and (3) of the Act of 2001; an offence under s. 4 of the Act of 2001 and an offence under s. 2 of the Criminal Damage Act 1991. One of the six charges included in the order was a summary offence contrary to s. 13 of the Criminal Justice (Public Order) Act 1994 ("the Act of 1994").

2.2 It is not disputed that the inclusion of the charge under s. 13 of the Act of 1994 in the return for trial is an error as the applicant was returned for trial in a manner not prescribed by statute. Section 6 of the Criminal Justice Act 1951 permits summary charges to be added to an indictment once an accused person has been validly sent forward for trial but there is no basis in law for sending an accused person forward for trial on a summary charge together with indictable charges.

2.3 At para. 5 of his statement of opposition, the notice party indicated that he did not propose to proceed with the summary charge.

3. **Counsels' Submissions**

3.1 Mr. McDonagh S.C., for the applicant submits that the return for trial, as it stands, is invalid due to the inclusion of the summary charge. He submitted that, as a result, the return for trial should be quashed. He relies on the judgment of this Court (Murphy J.) in *The Director of Public Prosecutions v. District Judge Flann Brennan* [2005] I.E.H.C. 277 in this regard.

3.2 Mr. McDonagh accepted that the return for trial was severable and he cited the decision of the Court of Criminal Appeal in *The People (Attorney General) v. Finbarr Walsh* (1972) 1 Frewen 363 in support of this proposition. However, he argued that if the return for trial is not quashed in its entirety and if the defective part is not excised by being quashed as a severable part of the return, then the entire return will remain tainted by the error, resulting in a serious impairment of the basis upon which the applicant will be put on trial in the Circuit Court.

3.3 The fact that the notice party has expressed his intention not to pursue the summary charge does not change, in his submission, the essential invalidity of the return for trial. He argued that it was not for the notice party to tell the Circuit Court Judge to ignore the error in the return for trial when a mandatory order of the District Court returning the applicant for trial existed. He submitted that it was appropriate for this Court to quash that part of the return for trial which was bad.

3.4 Mr. McDermott B.L., for the notice party, accepted that there was an error in respect of the inclusion of the summary charge on the return for trial and that its inclusion rendered the order defective. He contended also that the notice for trial was severable and that the erroneous part could be excised from the order. He also relied on *The People (Attorney General) v. Finbarr Walsh* (1972) 1 Frewen 363 in this regard.

3.5 He further submitted, however, that these judicial review proceedings are moot, in circumstances where it has been made clear that the notice party will not proceed with the summary matter and as a consequence no practical benefit would ensue to any party by quashing the defective part of the return for trial. As a result, in his submission, it would be a futile exercise to quash the return for trial. In respect of the concept of mootness he relied on *G v. Judge Mary Collins* [2005] 1 I.L.R.M. 1 and *O'Brien v. P.I.A.B.* [2006] I.E.S.C. 62. He argued that it was possible to ignore the defective part of the return for trial so as to enable the Circuit Court to proceed with the trial. He added that the applicant would ultimately be arraigned on foot of the indictment and not on foot of the return for trial and that there was no prejudice or significance arising from that part of the return for trial that referred to the summary charge.

4. **Issues**

4.1 The first issue that falls to be determined is whether a return for trial is severable. Secondly, it must be considered whether these proceedings seeking to quash the whole or part of the return for trial are moot, given that the notice party has indicated that he will not pursue the summary charge, the impugned part of the order.

5. **Severability**

5.1 In *The People (Attorney General) v. Finbarr Walsh* (1972) 1 Frewen 363 the applicant had been charged and convicted with, *inter alia*, an offence of breaking and entering with intent contrary to s. 27(2) of the Larceny Act 1916. In respect of this offence the return for trial recited an unlawful breaking and entering "*with intent to commit a felony*" but it did not go on to state the precise felony intended. The Court of Criminal Appeal held that the return for trial was a procedural order and that when the accused came before the Central Criminal Court he was tried on the count in the indictment which was properly framed and was not affected by the lack of particularity in the return for trial.

5.2 McLoughlin J. expressed the view at p. 365 that the fact that the return for trial, which may contain a number of charges, is a single document does not mean that it is not possible to sever it:-

> *"Mr. Sheridan [for the applicant] takes no exception to the statements of the other charges which are charges for offences under the Firearms Act but he contends that there is not a good return for trial on these charges because, he says, the order for return for trial on the three charges is one return for trial and if invalid as to one, being, as he contends, not severable, is invalid as to all.*
>
> *The Court has no hesitation in declining to accept this contention.*
>
> *A District Justice when he has brought before him a number of charges of indictable offences must consider each charge separately from the other and must come to a separate opinion on each charge as to whether he is justified in returning a person for trial on each such charge and the fact that he makes one order returning for trial in respect of several offences, cannot, in the view of the Court, make such an order non-severable."*

5.3 As outlined above it is the function of the District Judge to exercise his or her judgment on each charge individually in formulating an order returning an accused person for trial. Despite the fact that the return for trial is a single document, each charge that appears on it must be dealt with separately. This approach is consistent with the language used in s. 4A (1) of the Criminal Procedure Act 1967, as inserted by s. 9 of the Criminal Justice Act 1999 ("the Act of 1967"), which refers to an offence in the singular form. It states 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."*

5.4 The above dictum of McLoughlin J. is directly on point insofar as this case is concerned and I would respectfully follow it. I am satisfied that the return for trial is a severable document.

6. **Mootness**

6.1 In the above case of *The People (Attorney General) v. Finbarr Walsh* (1972) 1 Frewen 363, McLoughlin J., at p. 366, considered *obiter* that the appropriate course of action in respect of an invalid return for trial was the institution of judicial review proceedings seeking certiorari of the invalid order in advance of the trial taking place:-

> *"Even if the return for trial was invalid, in the circumstances of this case this Court is not the Court to which recourse should be had to obtain relief on account of such invalidity.*
>
> *An order of a District Justice which is bad on its face can be quashed in proceedings by way of certiorari. If left until the applicant appeared in the trial Court, his counsel should have made his objection to the trial being proceeded with when the applicant was called upon to plead to the Indictment. He did not do so. The applicant pleaded to an indictment which is, admittedly, good in all respects and submitted to his trial. To make the application when he did, at the close of the case for the prosecution, was too late."*

6.2 A recent example of where judicial review proceedings were instituted in respect of a defective return for trial is the case of *The Director of Public Prosecutions v. District Judge Flann Brennan* [2005] I.E.H.C. 277. In that case the return for trial was made in respect of two indictable offences and four summary offences. Given that s. 6 of the Criminal Justice Act 1951 does not permit an accused person to be sent forward for trial on summary charges, Murphy J. granted an order of *certiorari* quashing the entire order of the respondent District Judge sending the accused forward for trial to the Circuit Court and granted an order of *mandamus* requiring the respondent District Court Judge to determine an application to send the notice party forward for trial to the Circuit Court on the indictable charges only. In that case the Director of Public Prosecutions instituted the judicial review proceedings and there was no question of the Director not proceeding with the summary charges.

6.3 For the reasons outlined above, the Court can make an order quashing that part of the return for trial that purports to return the applicant for trial on a summary charge, leaving the rest of the order intact.

6.4 The fact that the notice party has indicated that he has no intention of proceeding with the summary charge, in my view, cannot have any effect on the necessity for judicial review proceedings seeking *certiorari* to correct the fault in the order of the District Court returning the applicant for trial. I am satisfied that unless this Court intervenes to correct the defective part of the return for trial, by either quashing the entirety of the order or that part of the order which is defective, as a matter of law, the trial court, the Circuit Court in this instance, will be bound by the terms of the order of the District Court. The Circuit Court, as the court of trial, will have no appellate jurisdiction in relation to the order of the District Court and no judicial review jurisdiction. This Court alone has the power, on a judicial review application to quash the defective part of the return. The notice party has no legal competence to alter the legal effect of the order of the District Court returning the applicant for trial, and hence cannot direct the trial court in any given case as to how that court is to proceed in respect of the trial of an accused person and cannot direct the Circuit Court to ignore a mandatory order of the District Court returning an accused person for trial on a specific charge. Such a state of affairs would usurp the constitutionally protected role of the courts. Section 4A of the Act of 1967 mandates only the District Court to send an accused person forward for trial and the Act does not give any power to the notice party to remove a charge or to require the Circuit Court to ignore some of the order.

6.5 As to the fact that the accused person will ultimately be arraigned on an indictment, this fact does not cure the defect that exits in the return for trial in its present form. The return for trial is the basis in law for the jurisdiction of the Circuit Court to proceed to try an accused for the offences set out in the indictment and is a necessary proof in every trial on indictment. The defect in the return in this case, if not removed by this Court would undermine the jurisdiction of the Circuit Court to embark on the trial of the applicant at all.

6.6 I have come to the conclusion, therefore, that it is necessary for this Court to intervene to quash that part of the return for trial in this case which purports to return the applicant for trial on the summary charge.

7. **Conclusion**

7.1 For the reasons set out in this judgment I will grant an order of *certiorari* quashing that part of the return for trial which returns the applicant for trial on the aforementioned summary charge.