THE COURT OF APPEAL

Neutral Citation Number: [2020] IECA 31

Record No. 2019/209

President
Kennedy J.
Donnelly J.

BETWEEN/

DANNY WYATT

APPLICANT/APPELLANT

- AND –

THE DIRECTOR OF PUBLIC PROSECUTIONS

REPONDENTS

JUDGMENT of Ms. Justice Donnelly delivered on the 3rd day of February 2020

Introduction

1. This is an appeal against *inter alia*, the refusal of the High Court to grant an order of I quashing the trial judge's ruling in permitting the filing of the appellant's indictment, permitting his trial to run concurrently with another accused without jurisdiction and to quash the finding of the jury. The appellant also seeks a declaration that the trial conducted against the appellant was a nullity.

Background

2. The appellant was charged with one count of assault causing harm contrary to s.3 of the Non-Fatal Offences Against the Person Act, 1997 (hereinafter, "the 1997 Act"). Mr. Nathan Burke was also charged with assault causing harm contrary to s.3 of the 1997 Act. The charges related to the same alleged incident of assault causing harm of another person.

3. Mr. Burke was returned for trial to the South Eastern Circuit Court sitting at Clonmel on the 21st February, 2017. The Book of Evidence was served on him in Clonmel District Court on the same date. The appellant was returned for trial on the 7th March, 2017 with the Book of Evidence being served on him in Clonmel District Court on the same date. This later return for trial of the appellant was due to the fact that a bench warrant had issued earlier in respect of the appellant.

4. When both accused appeared before the Clonmel Circuit Court a joint indictment was preferred against them, containing a single s.3 assault charge against the appellant and Mr. Burke. At the preliminary hearing on the 30th November, 2017, the respondent made an application for leave to amend the combined indictment with the effect that it only related to Mr. Burke; and, for liberty to file an indictment which related only to the appellant. A third application was then made to have both cases proceed together on the basis of concurrent trials. A jurisdictional objection was raised by counsel for the

appellant. The trial judge acceded to the respondent's applications indicating that it was the "*common sense approach*".

5. The appellant made an unsuccessful application for separate trials on the basis of prejudice. Both trials commenced before the same jury on the 5th December, 2017.

6. At the outset it must be noted that there would have been nothing improper in proceeding with the joint indictment against both accused. It appears that prosecution counsel at the trial may have felt that the decision in *Conlon v. Kelly* [2002] 1 I.R. 10 did not permit this approach where the returns for trial had been made on separate days. In my view, that was an incorrect reading of the decision in that case. The respondent in effect acknowledged that the wrong approach had been taken.

7. That initial error set the scene for what was a highly unusual situation in that the accused were arraigned on their individual indictments before the same jury. The two trials proceeded concurrently and when the matter went to the jury, two issue papers were provided to the foreman. Each issue paper bore a different bill number relating to a different accused. The appellant was found guilty whereas the jury could not reach a majority verdict on Mr. Burke.

8. The appellant brought these judicial review proceedings prior to the imposition of sentence upon him. The respondent did not object to this course of action and repeated at the appeal hearing that she was of the view that it was an appropriate case for judicial review. In *DPP v. Special Criminal Court* [1999] 1 I.R. 60 the Supreme Court endorsed earlier dicta about "*the undesirability of people repairing to the High Court for judicial review in relation to criminal trials at any stage (and certainly not during their currency)*". In my view, the reference to "any stage" includes the sentencing stage. It is only in exceptional circumstances that recourse may be had to judicial review prior to sentencing. In the present case it seems to me, this discrete point could have been dealt with by early appeal and/or an application for bail if that was necessary. It is to be noted that the cases from England and Wales referred to below and relied upon by the appellant, were all judgments given in the context of appeals from criminal trials. Given the attitude of the respondent, it is appropriate for this Court to proceed to hear and determine the appeal. That should not be taken as an endorsement of the approach taken by either the appellant or the respondent in these proceedings.

The Judgment of the High Court

9. The trial judge in his judgment outlined the grounds which were granted at the leave stage of the judicial review:

> *"(i) The Applicant was denied his constitutional right to a trial in due course of law in circumstances where the procedure adopted by the Respondent has no basis in law;*
>
> *(ii) The learned trial Judge in acceding to the Respondent's application for concurrent trials acted without jurisdiction;*
>
> *(iii) The trial conducted against the Applicant is a nullity."*

10. In the course of his submissions at the High Court hearing, the appellant referred to examples of the impact that having separate trials before a single jury would present. He referred to the composition of the jury in a concurrent trial; the inability of Mr. Burke to be a competent or compellable witness for the appellant's defence and; the irrelevant evidence before the jury which was submitted as part of Mr. Burke's evidence. He submitted that these demonstrated how the appellant had been deprived of his constitutional right to a trial in due course of law.

11. The appeal was dismissed by the trial judge. Referring to the foregoing submissions, the trial judge held that the appellant was not entitled to rely on matters that were outside the scope of the grounds upon which leave was granted.

The Grounds of Appeal

12. The appellant submitted eight grounds of appeal, these are repetitive and interrelated. In essence, two key issues arise in this appeal: -

    (I) Did the trial judge err in identifying the grounds upon which the appellant sought judicial review and finding that the matters urged at the hearing were outside the scope of the grounds for which leave was granted?

    (II) Was the trial against the appellant a nullity?

The Appeal

Grounds outside the scope for which leave was granted

13. At the judicial review, the prosecution made a preliminary application on the grounds that the appellant could not advance new grounds for which leave was not granted. Counsel for the appellant submitted the trial judge erred in holding that they opened matters which were outside the scope of the grounds for which leave was granted. The trial judge held that the appellant's ability to "fashion" his own jury; inability for Mr. Burke to be a competent or compellable witness for the appellant and; evidence in relation to Mr. Burke's indictment being before Mr. Wyatt's jury, were three grounds which were absent from the leave which was granted.

14. Both parties referred to *A.P. v. DPP* [2011] 1 I.R. 729 in their submissions. In *A.P.*, Murray CJ. stated that: -

> *"It is not uncommon in many such applications that some grounds, and in particular the ultimate ground, upon which leave is sought are expressed in the most general terms as to the alleged frailties of the decision or other act being impugned, rather in the nature of a rolled up plea, and alluding generally to want of legality, fairness or constitutionality. This can prove to be quite an unsatisfactory basis on which to seek leave or for leave to be granted particularly when such a ground is invariably accompanied by a list of more specific grounds."*

15. The appellant was not entitled to plead grounds which were overly broad, including such grounds as want of legality, fairness or constitutionality without being specific as to what

was at issue. That was not what the appellant pleaded here. The appellant pleaded that the trial judge had *no jurisdiction* to permit concurrent trials to run.

16. In the written submissions, counsel for the appellant was merely expanding on the appellant's statement of grounds, namely, that the appellant was denied his constitutional right to a trial in due course of law due to the fact that the trial judge, *acting without jurisdiction*, caused the trials to run concurrently. The three "grounds" were merely examples as to the *effect* of running trials concurrently. The appellant's case was that such a concurrent trial was a nullity.

17. I am therefore of the view that the trial judge was incorrect in holding that the appellant was introducing new grounds outside the scope of grounds for which leave was granted for judicial review. The appellant was merely giving examples in the content of the legal submissions as to the importance of having a joint trial between co-accused rather than concurrent trials before the same jury. I now turn to the substantive issue as to whether the appellant's trial was a nullity.

Deprivation of the Right to a Trial in Due Course of Law? Is the Trial a Nullity?

18. This appeal is not advanced on the basis that the appellant identifies a particular prejudice in this case by reason of the concurrent trial he had with a separate accused, other than that he was denied a trial in due course of law. Nonetheless, the issue for this Court is a fundamental one: whether by statute or at common law an accused person can be tried at the same time and before the same jury as another person where both persons are not jointly accused? In answering that question, it will be necessary to consider the legal provisions concerning trials on indictment and the protections that refer to joint trials. First, it is important to review the constitutional provisions on the right to a fair trial and trials for non-minor offences.

19. Article 38(1) of the Constitution provides that no person shall be tried on any criminal charge save in due course of law. Article 38(5) of the Constitution provides that "[s]ave in the case of the trial of offences under section 2, section 3 or section 4 of this Article, no person shall be tried on any criminal charge without a jury." The trial of offences under sections 2, section 3 and section 4 refer respectively to trials of minor offences before courts of summary jurisdiction, special courts established by law such as the Special Criminal Courts and military tribunals. Article 38(5) in conjunction with article 38(2) mandates that all other non-minor offences shall be tried by jury.

20. The Constitution does not refer to the phrase "trial on indictment". Historically, trial on indictment was trial before a jury, the indictment being the written document placed before the jury. Criminal practitioners are familiar with the phrase "trial on indictment" as meaning trial for non-minor offences. It is, a phrase (or the phrase "on indictment") that is used repeatedly in legislation when referring to a trial of non-minor offences before a jury (or in appropriate circumstances, in a trial before the Special Criminal Court.

21. Indeed, pursuant to the Juries Act, 1976, the oath that a juror must take before the commencement of his or her duties, provides that the issue they are to determine is

whether the accused is (or are) guilty or not guilty of the offence charged in the indictment. The oath itself connotes that a jury are only present when there is a trial on indictment. By linking these constituent elements, it reads clearly that a trial on indictment is a trial for a non-minor offence. The Juries Act, 1976 is discussed further below.

22. Since independence in 1922 and subsequent to the enactment of the Constitution in 1937, there has been judicial consideration as to the legal basis for trial before a jury. Although the particular Acts providing the legal basis have been repealed, replaced or amended at various times, it is well established that there is a requirement that the accused is "sent forward" by the District Court for trial before the jury in the relevant Circuit Court or the Central Criminal Court. The Supreme Court held in *People (Attorney General) v. Boggan* [1958] I.R. 67 that the order sending an accused forward for trial by jury founds the jurisdiction for the subsequent trial. Lavery J. stated that "*trial on indictment was an ancient process*". In seeking to understand the basis of trial on indictment, he decided that it was sufficient to trace its history from the Petty Sessions (Ireland) Act, 1851. He identified the abolition of the right of a grand jury to prefer an indictment and stated that since 1924, the only person who could prefer an indictment was the Attorney General. This right is now limited by the 1937 Constitution to the Attorney General or some other person authorised in accordance with law for that purpose (now the Director of Public Prosecutions).

23. Lavery J. referred to s. 27 of the Courts of Justice Act, 1924 which abolished the grand jury in the Central Criminal Court and provided that "*every indictment shall be preferred directly to the jury which tries the accused*". Section 64 applied that provision to the Circuit Court. Lavery J. held that the basis of the jurisdiction to try an offence on indictment was the return for trial.

24. The courts of Ireland were established pursuant to the 1937 Constitution by the Courts (Establishment and Constitution) Act, 1961. While in principle the courts were "new" upon the commencement of this Act, the structure of the courts remained largely the same as they were prior to the commencement of the Act. Commencing on the same day as the Courts (Establishment and Constitution) Act, 1961, the Courts (Supplemental Provisions) Act, 1961 was enacted to deal with procedural matters among other more administrative court functions.

25. Section 11(3) of that Act, in relation to the Central Criminal Court, states that:-

> "(3) Every person lawfully brought before the Central Criminal Court may be indicted before and tried and sentenced by that Court, wherever it may be sitting, in like manner in all respects as if the crime with which such person is charged had been committed in the county or county borough in which the said Court is sitting."

Section 25 (1) of the same Act provides:

"(1) Subject to subsection (2) of this section, the Circuit Court shall have and may exercise every jurisdiction as respects indictable offences for the time being vested in the Central Criminal Court and every person lawfully brought before the Circuit Court in exercise of such jurisdiction may be indicted before and tried and, if convicted, sentenced by the Circuit Court accordingly."

Those persons charged with indictable offences are to be sent forward to the relevant Circuit Court for trial unless they must be sent forward to the Central Criminal Court, or if certain provisions apply to the Special Criminal Court as provided in section 25(2) of the same Act. The return for trial forms the basis of the jurisdiction to *try a person on indictment*.

26. In my view, the centrality of the indictment to the trial is thus confirmed by those provisions and the case law made thereunder. Moreover, the many statutory references to "trial on indictment" or to "conviction on indictment" places the indictment in prominent position as regards trials of non-minor offences.

27. An example of how important the indictment is to the concept of trial by jury is to be found in the appeal provisions regarding convictions in the Central Criminal Court. It is the fact of conviction on indictment itself that conferred a right of appeal to an accused to the Court of Criminal Appeal. This is seen in s. 31 the Courts of Justice Act, 1924 as substituted by s. 31(b) of the Criminal Procedure Act, 2010 whereby: "A person convicted on indictment before the Central Criminal Court may appeal under this Act to the Court of Criminal Appeal." Since the establishment of the Court of Appeal, the appeal is now to the Court of Appeal.

28. The Criminal Procedure Act, 1967, (hereinafter "the 1967 Act") provides for the documentation to be served on the accused prior to sending forward for trial and permits certain documents to be served after being sent forward. As it deals with the sending forward for trial, the 1967 Act does not make express provision as to an indictment being a necessary prerequisite of any trial, nonetheless the 1967 Act proceeds on the basis that such a document must and will be served. Sections 4M and 4N provide for the amendment of charges on the indictment and joinder of unrelated charges after an accused has been sent forward for trial.

29. The Criminal Justice (Administration) Act, 1924 governs the service and contents of the indictment. It makes explicit provision for the content and form of the indictment both in the sections of the Act and the indictment rules set out in the schedule to that Act. While the Act does not expressly explain that the indictment forms the basis of the trial, in my view, that silence does not take from the centrality of the indictment to the trial process. On the contrary, it demonstrates that it was such an accepted feature of a trial by jury at common law, that no legislative reference or definition of trial on indictment was deemed necessary.

30. The general provisions as regards indictments are contained in the Criminal Justice (Administration) Act, 1924. Section 4 of that Act provides: -

"(1) Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.

(2) Notwithstanding any rule of law or practice, an indictment shall, subject to the provisions of this Act, not be open to objection in respect of its form or contents if it is framed in accordance with the rules under this Act."

That section explicitly recognises that rules of law or practice exist in relation to indictments. Those rules of law or practice may not form the basis for objection in respect of *form or content* if they are framed in accordance with the rules under the Act. The issue of whether a jury is entitled to have a single trial in respect of two or more separate indictments is not a question of "*form or content*". It is a fundamental issue going to the basis for the trial itself.

31. Sections 6(1) and 6(2) of that Act provides for the amendment of an indictment before trial, or at any stage of the trial by order of the court. These are the legislative provisions that expressly deal with trial on indictment. I will now turn to the particular arguments put forward by counsel on appeal.

32. Counsel for the appellant relied on *Conlon v. Kelly* to establish that the trial judge in the present case had no jurisdiction to run the trial of Mr. Burke and the appellant concurrently. This case is different to *Conlon v. Kelly*. In the latter case, the Supreme Court was tasked with deciding whether the Circuit Criminal Court had jurisdiction to consolidate the two independent indictments containing counts based on separate returns for trial. The DPP made an application to "consolidate" in one bill of indictment, charges for which the applicant had already been tried and on which a jury failed to reach a verdict, with a separate indictment containing new charges of a similar type. It must also be noted that Conlon v. Kelly involved one accused.

33. In *Conlon v. Kelly*, the Supreme Court reasoning (judgment of Fennelly J.) is centred around the jurisdiction a court has to amend an indictment. Fennelly J. refers to s.6(1) of the Criminal Justice (Administration) Act, 1924, which provides: -

> *"Where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless the required amendments cannot in the opinion of the court be made without injustice, and may make such order as to the payment of any costs incurred owing to the necessity for amendment as the court thinks fit."*

In his judgment, Fennelly J. stated that this is the only relevant power the court has to amend an indictment. He stated that s.6(1) does not permit an amendment which would entail combining counts from separate indictments based on separate returns for trial.

Rather, the section implies that an indictment has already been framed and this envisages a single return for trial.

34. Fennelly J. stated that "*any change in an indictment, once it has been preferred, requires statutory authority. There is, in my view, no statutory authority for the 'consolidation' of two indictments of the sort which occurred here.*" While Order 49, r.6 of the Rules of the Superior Courts (hereinafter, "the RSC") states that "[c]auses or matters pending in the High Court may be consolidated by order of the Court on the application of any party and whether or not all the parties consent to the order", Fennelly J. states that Order 49 was not intended to apply to criminal proceedings.

35. In the present case, a joint indictment was submitted in the beginning. This was perfectly permissible; the trial could have then proceeded without incident and without the necessity for this judicial review. Instead, the appellant sought to amend that indictment by deleting this appellant from it and by lodging a separate indictment against this appellant. There was no consolidation of indictments by the Circuit Court judge. Two trials ran concurrently and separately, in such a way that the jury were presented with two charge sheets and had to come to a verdict on both. However, Fennelly J.'s judgment is instructive insofar as it highlights the importance of abiding by the rules in relation to indictments and that in criminal proceedings, the courts should not strain simple procedural provisions.

36. There are no Irish authorities that deal with this specific procedural issue, however, counsel for the appellant provided relevant English authorities which are instructive. In *Crane v. DPP* [1921] 2 A.C. 299, there were two accused, both of whom were separately indicted. Each accused was given in charge of the same jury as if they were jointly indicted. Counsel for the appellant in *Crane v. DPP* argued that the appellant was convicted on evidence that would not have been admissible against him. The House of Lords stated that: -

> *"In the ordinary course there would have been a joint indictment against these prisoners, who would then have been tried together, subject to the power of the judge to order a separate trial if the interests of justice so required."*

It is also the position in Ireland that where there are co-accused, they are usually jointly indicted subject to the power of the trial judge to sever the indictment, which would then have the result that the accused are tried separately before different juries.

37. The procedural qualm a concurrent trial of separate accused poses is laid out by Lord Atkinson when he stated that an accused might by his peremptory challenges "*put off from the jury the very men by whom the other desired to be tried*". The appellant submits a similar situation arose in his case; he was not afforded the opportunity to freely exercise his right of peremptory challenge. That submission does not appear to be based upon an averment in the affidavit, however, it is indicative of the type of situation that could arise if this type of separate trial before a single jury is permitted.

38. Counsel for the appellant opened *R v. Olivo* (1943) 28 Cr. App. R.173. R v. *Olivo* centred around a joint trial containing three separate indictments with each indictment pertaining to a different accused. The first was charged with conspiracy to defraud; the second was charged with obtaining money by false pretences; the third was charged with attempted fraudulent conversion of money. Tucker J. held that this led to the trial being deemed as a nullity. He held that: -

> *"there is no reason why all these three charges should not have been included in one indictment, in which case there would have been no objection to all three being investigated together[…]it has for a great number of years been elementary in criminal procedure that, if there is more than one indictment, the indictments cannot be tried together, and any so-called trial at which such a procedure has been adopted is a complete nullity."*

39. It is unfortunate that neither the court in *R v. Olivio* nor the court in *Crane v. DPP* provide a clear rationale as to why the trial should be deemed a nullity. It can be inferred from the judgments however, that to permit such an unusual procedure whereby a trial would consist of more than one indictment would be to fly in the face of long-established criminal procedure and *prima facie* renders the trial a nullity. Lord Sumner in *Crane v. DPP* held that while "*to all appearances*" the accused was being jointly tried with another person, in reality the accused was being tried separately as he was not jointly indicted and even though the accused was "*simultaneously undergoing the same procedure before the same jury and sharing in the evidence, the speeches, and the summing up*" it was held he was tried and convicted on an indictment which did not exist.

40. *Crane v. DPP* was reinforced in *R v. Dennis* [1924] 1 K.B. 867 in which the Court of Appeal held that while the separately indicted accused before the same jury in *Crane v. DPP* did not consent to a concurrent trial, there is no situation in which a criminal court has jurisdiction to try two separate indictments at one and the same time. Giving consent to this procedure cannot give the court jurisdiction to proceed in this manner.

41. In the present case, the Circuit Court judge stated that he was adopting the "*common sense approach*" in running the trial regardless of separately indicted accused. However, to disregard established criminal practice, or, as Lord Atkinson phrased in *Crane v. DPP*, a practice which is "*elementary in criminal law*", is to pose an uncertainty upon an accused at a time when he or she is most exposed. Moreover, since this procedural irregularity came about because of an error in the understanding of the permitted procedure by the respondent, the Court should be very wary of moving from what appears to be the well-established procedural rule unless such a variation is clearly permitted by law and there is no risk to fair trial rights of accused persons, should that occur.

42. If the Court were to allow the practice of running a concurrent trial of two separately indicted accused before a single jury, a further question would arise as to whether there would ever be a limit as to the amount of indictments upon which a single jury would have to provide their verdict on. This could involve, at least in theory, concurrent trials on

unrelated matters concerning a single accused, related matters concerning multiple accused or unrelated matters concerning multiple accused.

43. As the appellant was being tried separately and not jointly, it is important to consider if this change in long established procedure did affect, or could affect, any procedural or other fair trial rights to which he would have been entitled as a co-accused in a joint trial.

Irish Legislation

Criminal Justice (Evidence) Act, 1924

44. Section 1 of the Criminal Justice (Evidence) Act, 1924 (hereinafter, "the 1924 Act"), provides that an accused "shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with another person". [Emphasis added]. The issue of compellability is dealt with in s.1(a) of the 1924 Act which provides that "a person so charged shall not be called as a witness in pursuance of this Act except upon his own application". The rationale behind this protection is that an accused should be entitled to swear his own innocence but cannot be compelled by any other party to give evidence in his or her own trial. It is the sole choice of the accused. As McGrath, *Evidence*, 2nd Edn., (Round Hall, 2014) states, "*where an accused is tried jointly with another person or persons, he or she is a competent but not compellable witness for his or her co-accused.*" [Emphasis added].

45. The issue that arises with a concurrent trial of separate accused before the same jury, is that for the purpose of s.1(a) of the 1924 Act, the appellant was in fact a compellable witness for Mr. Burke's defence. This is because there was no joint trial of both accused and the provisions of the 1924 Act do not apply. To use the example of Mr. Burke and the appellant, the appellant was not a co-accused as there was in fact, two separate trials running concurrently with each other and therefore Mr. Burke could have compelled him to give evidence in Mr. Burke's trial before that jury. If that had occurred, this would have had the effect of the jury hearing the appellant give evidence before them in circumstances where, if he had been tried on his own or tried jointly, he could not have been so compelled. The legal effect of such evidence would then have to be considered. Was it evidence in the appellant's own trial? Or would the jury have to be told to proceed on the basis that it was not evidence in the appellant's trial and that they should disregard it? The unsatisfactory implications of this situation are self-evident.

46. Another uncharted area in a concurrent but not joint trial is where an accused actively seeks to give evidence against another accused. For example, if the appellant sought to give evidence at trial stating that Mr. Burke was unworthy of belief, the appellant could do so without consequence. This is due to the fact that s.1(f)(iii) of the 1924 Act would be inapplicable to the appellant. Section 1(f)(iii) provides that:

> "[A] person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless— […]

(iii) he has given evidence against any other person *charged with the same offence.*" [*Emphasis* added].

47. It is relevant to point to the determination in England and Wales by Donovan L.J. in *Murdoch v. Taylor* [1965] A.C 574 that "evidence against", for the purposes of s.1(f)(iii) means evidence which supports the prosecution in a material respect or which undermines the defence of a co-accused. This is especially true in the present case. As they were not jointly charged on a single indictment and were not co-accused s.1(f)(iii) does not apply. The dicta of Finnegan J. in *DPP v. Kavanagh* [2008] IECCA 100 supports that proposition.:-

> *"Section 1(f)(3) is not relevant: while in her evidence she gave evidence that her co-accuseds had committed the robberies with which she and they were jointly charged they had entered guilty pleas prior to her giving evidence and had been sentenced: this was not 'evidence against any other person charged with the same offence'."*

Section 1(f)(iii) is an absolute provision insofar as a trial judge does not have discretion to disallow the accused to be cross-examined once they have given evidence that triggers the application of s.1(f)(iii). This was stated in *Murdoch v. Taylor*: -

> *"when it is the co-accused who seeks to exercise the right conferred by proviso (f)(iii) different considerations come into play. He seeks to defend himself; to say to the jury that the man who is giving evidence against him is unworthy of belief; and to support that assertion by proof of bad character. The right to do this cannot, in my opinion, be fettered in any way."*

Since the appellant is not technically "charged with the same offence" as required in s.1(f)(iii), it is inapplicable to him. He could in fact discredit the other accused in front of the same jury as Mr. Burke and the remaining provisions of s.1(f) of the 1924 Act could appear to allow him to do so with impunity (at least insofar as his own trial before the jury was concerned). That again would be a highly unsatisfactory position if the respondent's proposition is correct that concurrent but not joint trials are permissible. The jury would be entitled to take into account the evidence emerging from his cross-examination for the purpose of Mr. Burke's trial but not for the purpose of his own trial. At a pragmatic level that would present very real difficulties but at a level of principle it would also appear wrong to direct a jury to ignore the evidence of an accused person when speaking of issues directly relevant to his trial.

Juries Act, 1976

48. In the judicial review, counsel for the appellant submitted that there is no legal basis to run concurrent trials by virtue of s.19(1) of the Juries Act, 1976 (hereinafter, "the 1976 Act"). Section 19(1) provides the wording of the oath that is to be administered to each juror:-

> "I will well and truly try the issue whether the accused is (or are) guilty or not guilty of the offence (or the several offences) charged in the indictment preferred

against him (or her or them) and a true verdict give according to the evidence."

The wording of the oath *prima facie* connotes that the jury are to decide upon one indictment only.

49. Section 18(a) of the Interpretation Act, 2005 provides: -

> "A word importing the singular shall also be read as importing the plural and a word importing the singular shall be read as also importing the plural […]".

In light of this, the argument that the 1976 Act only provides for one indictment to be presented to the jury by virtue of the use of the singular "indictment" is not compelling. It is noteworthy however, that when enacted the Oireachtas distinguished between the offence (or several offences) and the indictment, the former was expressly pluralised while the latter remained singular. The manner in which the 1976 Act was drafted thus supports a view that there was at least an understanding that the trial procedure only provided for a single indictment on which a number of charges could have been laid. Most importantly however, the possibility of interpreting the oath a juror takes to include a reference to a number of indictments, cannot, in my view, amount to an alteration of what appears to be the ancient process that trial on (an) indictment is the manner in which criminal trials proceeded at common law.

50. Sections 20 and 21 of the 1976 Act provide the framework by which each party exercise their right of peremptory challenge of a juror. A party may seek the removal of a juror with or without cause. An accused person can challenge up to seven jurors without cause. This means, that if there were two jointly accused, they could challenge up to fourteen jurors between them and the prosecution could challenge seven others. If the trial is a separate trial, the 1976 Act appears to allow the prosecution make fourteen peremptory objections and thus have seven more challenges than each individual accused in his or her own trial. Furthermore, it means that if the trial is to be truly considered a separate trial, as set out above, each individual accused is being denied access to the full jury panel. This is evident in the situation whereby a totally separate accused may have challenged a particular juror, thus depriving the other separate accused of the right to be tried in his or her own separate trial by that juror.

Conclusion

51. In the course of this judgment, I have held that the appellant did not submit grounds which were outside the scope for which leave was granted. Counsel for the appellant was merely providing examples as to the prejudicial effect of the trial judge acting outside of his jurisdiction.

52. Having looked at the legal provisions in Ireland both before and after independence, I am satisfied that the decision of the House of Lords in *Crane v. DPP* also represents the common law position in Ireland. There has been no legislation enacted by the Oireachtas which overturns the common law position that the right of a jury to try a person is based upon the right of the jury to try in respect of a single indictment. No Irish case law lends

any support to the contention of the respondent that she was entitled to lodge two indictments and ask a single jury to try both indictments at the same time.

53. The statute law that exists regarding fair trial rights for accused persons and other procedural issues do not envisage that any trial of two or more persons would be other than a joint trial. These arise out of the right to challenge jurors at trial and the restrictions on the compellability of accused persons by another accused in a joint trial.

54. I am satisfied that as a matter of law, trial by jury under the Constitution is trial on indictment. Trial on indictment is an ancient process whereby the accused is formally on notice of the charges that will be put before the jury. At common law, this single document goes before the jury. At common law and as recognised in statutory enactments, a joint indictment may be permitted. Legislative protections for co-accused apply to those joint trials. The failure to enact such protections or restrictions for separate trials of accused persons before a single jury supports the proposition that the common law rule of a single indictment to be laid before a jury in each trial has not been altered.

55. Accordingly, I would allow the appeal.