Neutral Citation Number: [2011] IEHC 74

THE HIGH COURT

2009 1343 P

BETWEEN

NOEL BROHOON

PLAINTIFF

AND

IRELAND, THE ATTORNEY GENERAL AND THE DIRECTOR OF PUBLIC PROSECUTIONS

DEFENDANTS

JUDGMENT of Kearns P. delivered the 4th day of March, 2011.

In these proceedings the plaintiff challenges the constitutionality of s. 4 (E) (7) of the Criminal Procedure Act 1967 and seeks a declaration that the said section is in breach of Article 40.1 and/or Article 38.1 and/or Article 40.3 of the Constitution in that it discriminates against the plaintiff by not providing an appeal against the decision of the Circuit Court to the Court of Criminal Appeal in a particular circumstance where the third named defendant enjoys such a right of appeal. The plaintiff also seeks a declaration that the said section is in breach of Article 6 and Article 14 of the European Convention on Human Rights on the same grounds. However, in the course of the hearing before this Court, counsel elected to confine his attack on the statutory provision in question to arguments relating to the Constitution.

Section 4(E) of the Criminal Procedure Act 1967 provides as follows:

> "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…
>
> (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.
>
> (7) Where a charge is dismissed by the trial court under subsection (4), the prosecutor may within 21 days after the dismissal date, appeal against the dismissal to the Court of Criminal Appeal."

BACKGROUND

The facts of this matter may be briefly stated. In April 2007, the third named defendant instituted criminal proceedings against the plaintiff by way of charge sheet no. 741253 in respect of a criminal offence alleged to have been committed on 19th January, 2008.

The plaintiff was charged that on that date whereas another person had committed an arrestable offence, namely robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001, knowing or believing that said person to be guilty of the said offence or some other arrestable offence, did without reasonable excuse an act with intent to impede the apprehension or prosecution of the said person contrary to s. 7 (2) and (4) of the Criminal Law Act 1997.

On 23rd July, 2008, the plaintiff was returned for trial to the Circuit Criminal Court for Dublin.

On 10th November, 2008 counsel for the defendant applied in Dublin Circuit Criminal Court to have the case against him dismissed pursuant to s. 4(E) of the Criminal Procedure Act 1967 which said application was heard by his Honour Judge McCartan.

The basis of the application was that the plaintiff's alleged actions as described in the book of evidence did not amount to impeding the apprehension or prosecution of another named person. In particular, it was argued that while the plaintiff's alleged actions as described in the book of evidence could lead to an inference that he was complicit in the crime of robbery, they did not establish that he was in some way complicit in impeding the apprehension or prosecution of an individual. It was submitted that a proper construction of the statutory offence of impeding the apprehension or prosecution of a person as set out in s. 7(2) of the Criminal Law Act 1997 requires that the prosecution establish that the accused, by some positive action, assisted another person to escape either apprehension or prosecution.

The learned Circuit Court Judge refused the said application on the following grounds:

> (a) He was satisfied that there was more than sufficient evidence to put the plaintiff on trial;
>
> (b) The interpretation of the offence of assisting an offender as set out in s. 7(2) of the Criminal Law Act 1997 was not as narrow as had been contended for by the plaintiff.

It is asserted on behalf of the plaintiff that he wishes to appeal the said order but that there is no procedure conferring a right of appeal on the plaintiff pursuant to the Criminal Procedure Act, 1967 or otherwise. Such an entitlement is available to the prosecution only.

The present proceedings were commenced by plenary summons on 12th February, 2009, some three months after the order in question was made and some two months after a trial date was set.

SUBMISSIONS OF THE PARTIES

On behalf of the plaintiff, Mr. Conor Devally, S.C., commenced by stating that it was no part of the plaintiff's case that the judge in

this case had acted outside jurisdiction. The plaintiff's challenge was confined to attacking a section which confined a right of appeal to one side only in criminal proceedings. The plaintiff was not attacking the entitlement of the State to appeal a judge's ruling under the relevant section to the Court of Criminal Appeal, but was confining his attack to the denial of similar rights in the section for the benefit of an accused person.

Counsel on behalf of the plaintiff submitted that the rights reserved to the plaintiff at trial did not make up for the discriminatory nature of the legislative provision.

Counsel stressed that the issue he was raising was not a "fair trial" issue, but rather a procedural issue revolving around the inception of the trial process with a view to ensuring that it is not arbitrary. The Court has a supervisory function to ensure needless trials are not inflicted upon an accused person. He argued that, without the protection of a right of appeal for an accused person from a ruling refusing to dismiss charges, a person could be *wrongly brought* to trial. It was further submitted that there were no grounds for speculating that to grant a right of appeal to an accused person would open floodgates to a series of appeals to the Court of Criminal Appeal in an effort to subvert the trial process.

On behalf of the defendant, Mr. Paul Anthony McDermott, B.L. argued that the State had quite a different stake in the procedural process. For example, the State might require a right of appeal to protect the status of other cases where the same point arose, a difficulty which would not arise in the case of an individual accused person.

He argued that there was no invasion of an accused person's constitutional rights effected by the section. In fact, it confers a right on him, namely the right to apply for dismissal of charges prior to trial. Such a person, even if unsuccessful in his application, brings all his rights to the trial and can still complain again at that point about an insufficiency of evidence.

Counsel argued that there is no need or requirement in Irish law for an absolute equality of entitlements in every respect on procedural matters as between the prosecution and a defendant. On the contrary, the different nature of their respective functions requires recognition in an appropriate manner in legislation.

He argued that even when the accused person raises the point unsuccessfully again at his criminal trial he may still appeal to the Court of Criminal Appeal if convicted. If unsuccessful in the Court of Criminal Appeal, the accused may still seek leave to appeal to the Supreme Court on a point of law. But for the section, the prosecution would enjoy no such rights because the prosecution would be terminated by an order dismissing the charges.

The prosecution had been given a statutory opportunity to appeal a s. 4 (E) ruling to dismiss a case on the basis that, without this opportunity, an erroneous ruling on a legal matter with implications for other cases might not again arise as the prosecution would have terminated. There was therefore a good reason for there being a speedy mechanism available to the prosecution whereby it could appeal an adverse ruling under section 4 (E).

DISCUSSION
Section 4 (E) of the Criminal Procedure Act 1967 was inserted in that Act by s. 9 of the Criminal Justice Act 1999. Prior to the Act of 1999, the District Court Judge was required to consider the documents served on an accused person, the exhibits and any oral evidence and decide whether in the case of an indictable offence there was sufficient case against the accused to merit sending him forward for trial. In the event that the District Court Judge decided that the case was insufficient to send an accused person forward for trial, he was required to discharge the accused.

Part III of the Act of 1999 abolished preliminary examination, the procedure described in the First Interim Report of the Committee on Court Practice and Procedure as having the advantage of requiring:-

> "That the case against the accused must be investigated and weighted by a judicial officer who is independent of the prosecution and defence alike before the accused can be put upon his trial. As such it is a valuable safeguard to the citizen against speculative prosecution and protects him against the ordeal, expense and distress of a public trial by jury merely upon accusation."

The Committee further considered that "any recommendation to abolish entirely a preliminary investigation of the offence by a judicial officer would be contrary not only to this concept of (an accused person being put on trial for a serious offence upon accusation) but to this concept of justice…."

Years later, the 24th Interim Report of the Committee on Court Practice and Procedure also acknowledged the valuable role of preliminary examination and said that it remained an important safeguard for an accused person against possible errors on the part of the prosecution (see 24th Interim Report of the Committee on Court Practice and Procedure, p. 65, para. 30(A)).

The judicial determination formerly reserved to the District Court as to whether the plaintiff should stand trial is now vested in the Circuit Court under s. 4 E (4), although this jurisdiction is now more limited than that formerly vested in the District Court. Under the Act of 1967 that court could determine a number of issues, including:-

> (a) Whether the accused should be sent forward for trial on the existing charges or on any other charges;
>
> (b) Whether the offences could be considered as minor offences;
>
> (c) Whether a summary offence only had been disclosed; or
>
> (d) Whether no case of any kind had been established against him in which event he should be discharged.

In contrast, the Circuit Court may not add or substitute charges or determine that a summary offence only is disclosed and cause the accused to be charged accordingly. Its only jurisdiction is to accede to or refuse an application on one or more of the charges against an accused person. Thus the sole issue in respect of which the Director of Public Prosecutions is entitled to appeal under s. 4 E (7) is whether the trial court erred in dismissing a charge or charges under s. 4 E (4). A finding to the contrary effect against an accused person is not amenable to appeal.

There can be no doubt but that the preliminary examination procedure was a valuable entitlement available to an accused person where it was sought to prevent a case going to trial on the basis that there was an insufficiency of evidence. Thus in *Phipps v. Judge Hogan and the Director of Public Prosecutions* [2008] 3 I.R. 221, Hardiman J. commented on the section 4 (E) procedure as follows at

pp. 224 and 225:

> "The Act of 1999 abolished provisions of the Criminal Procedure Act 1967 which provided for a preliminary examination of indictable charges in the District Court. Up to the passing of the Act of 1999 it was possible for an accused to have the charges against him dismissed in the District Court if that court was not satisfied that there was a sufficient case to put him on trial. Although that procedure has been abolished, the Act of 1999 conferred certain compensating entitlements on accused persons, which were however required to be exercised in the court of trial rather than in the District Court. The right to apply for the dismissal of the charges pursuant to s. 4 E is one such entitlement. These are important rights. Quite clearly (to speak only of the right to apply to have a charge dismissed) if there is a single point which may avail an accused to the extent of fatally undermining the charges against him, it is a great advantage to have this determined before the trial itself. Disposal in this way represents a major saving of time and expense to both sides, avoids inconvenience to witnesses and jury persons, brings a rapid end to an accused's anxieties … and brings about a resolution of the action between the prosecutor and the accused at the earliest possible time, freeing up court time for other cases."

Under the old regime, neither side had a right of appeal pursuant to statute on a decision of a District Court Judge on preliminary examination. The right to appeal by way of case stated to the High Court was confined to summary matters and could not be invoked in relation to preliminary examinations. The consultative case stated procedure to the High Court applied only to decisions in "cases". (as per s. 2 of the Summary Jurisdiction Act 1857 as extended by ss. 51 and 52 of the Courts (Supplemental Provisions) Act, 1961). Furthermore, a decision on preliminary examination was not amenable to an order of *certiorari* in circumstances where an erroneous finding of fact was made. This is apparent from the decisions of the Supreme Court in *Killeen v. Director of Public Prosecutions and Others* [1997] 3 I.R. 218 and *Director of Public Prosecutions v. Judge Kelliher and Another* (Unreported, Supreme Court, 24th June, 2000).

As Keane J. stated in the *Killeen* case at p. 226:-

> "It is also clear that where a District Judge, having considered the materials before him, forms an opinion either that there is sufficient case to put an accused on trial or that there is not, his order sending the accused forward for trial or discharging him, as the case may be, cannot be set aside on *certiorari*."

That rationale was applied by the Supreme Court in *Director of Public Prosecutions v. District Judge Kelliher and Another* where in the course of his judgment Keane C.J. made an observation by way of *obiter* upon which considerable reliance has been placed by the plaintiff in this case when he stated:-

> "…It is within the legal capacity of the tribunal, in this case the District Court, to make a wrong decision or a right decision and it is not possible for an applicant to do what the Director seeks to do here that is to say to rely upon the degree of wrongness, if I can use that phrase, of the decision or the apparent manifest incorrectness of the decision as opposed to what in another case might be said to be its arguable incorrectness.
>
> Either course involves the High Court and this Court on appeal in inquiring into the merits of the decision and inquiring whether on the facts before him the District Judge was right or wrong in the course that he took. That is not a course which it is open to the Superior Courts to take in judicial review proceedings. <u>It is tantamount to affording the Director a right of appeal in such case and of course it must inevitably follow that such a right of appeal would have to exist also in the case of an accused person who conversely took exception to an order returning him or her for trial</u>." (Emphasis added)

Counsel on behalf of the plaintiff has argued that the provisions of Articles 34, 38.1, 40.1 and 40.3 of the Constitution effectively postulate that in the administration of criminal justice an accused person should *prima facie* have an equal right of appeal to that of the Director of Public Prosecutions. Whereas the right of appeal afforded to the Director under s. 4 E (7) is calculated to afford an opportunity to rectify an erroneous decision to dismiss a charge against a person thought to be guilty, it followed, as Keane C.J. indicated in *Kelliher*, that an accused person should enjoy a similar right. It was argued that to deny an accused person a similar right is to exclude him from an early opportunity to secure a dismissal in circumstances where he may be innocent, a higher order of injustice.

However, whilst arguing for a mutuality of procedures, including appeal procedures in criminal proceedings, counsel on behalf of the plaintiff was unable to point to any authority which stated that the procedures available to an accused person and to the prosecutor in the context of criminal procedures must be identical.

That either side to a criminal prosecution may have different interests which require to be identified and recognised was acknowledged by the Supreme Court in *Fitzgerald v. Director of Public Prosecutions* [2003] 3. I.R. 247 in which Keane C.J. stated the following at pp. 257 and 258:-

> "In the present case, the requirement that the District Court should state a case for the opinion of the Superior Courts where he is requested so to do by the law officers does not interfere in any way with the exercise by the courts of their jurisdiction to determine the guilt or innocence of the accused person. On the contrary, it enlarges the jurisdiction of the courts in dealing with such cases by facilitating the setting aside by the Superior Courts of a determination which is erroneous in point of law. In my view, it was perfectly legitimate for the legislature to proceed on the basis that the law officers, as persons charged with serious constitutional responsibilities, would not have the same motives for prosecuting specious and time wasting appeals as others."

A number of examples can be readily found where there are procedural differences as between the prosecution and the defence. Thus, s. 40 of the Criminal Justice Act 1994, which deals with the forfeiture of cash, provides that any party to the proceedings in which a s. 39 order is made (other than the Director of Public Prosecutions) may, before the end of the period of 30 days beginning with the date on which it is made, appeal in respect of the order to the High Court. Under this provision, the Director is not given a right of appeal against a refusal to forfeit cash.

Section 116 of the Criminal Justice Act 2006 also provides that a person against whom an anti-social behaviour order is made can appeal to the Circuit Court, whereas there is no reference to a right of appeal for the garda who sought the order.

It is also the case that there is no general common law right of appeal, nor does Article 34.3.4 of the Constitution require there to be an appeal from each and every decision of the Circuit Court. Article 34.3.4 refers to a "right of appeal as determined by law" from

courts of local and limited jurisdiction. In the case of *State (Hunt) v Donovan* [1975] I.R. 39, the prosecutor complained of the absence of a right of appeal from his sentence in the Circuit Court in circumstances where he had pleaded guilty in the District Court. However the Supreme Court affirmed the view of the High Court (Finlay J.) that ss. 4 of s.3 of Article 34 did not require that there be a right of appeal from each and every decision of the Circuit Court. All that the Constitution requires is that no court of local or limited jurisdiction be established from which there is no right of appeal. Thus in *Todd v. Murphy* [1999] 2 I.R. 1, the Supreme Court refused to declare that s. 32 of the Courts and Courts Officers Act 1995 was unconstitutional in failing to provide a right of appeal to a defendant from a Circuit Court's decision on the venue of a trial. In the judgment of the High Court, subsequently affirmed by the Supreme Court, Geoghegan J. stated at pp. 4 and 5:-

> "It may be difficult to draw the line as to when a right of appeal is constitutionally required, but it is not necessary to draw it in this case as in my view it was clearly open to the Oireachtas to preclude a right of appeal from a preliminary decision of a trial judge in a criminal case to alter the venue of the trial."

Can it be said in the instant case that the absence of a right of appeal from the ruling of the Circuit Court Judge is tantamount to some invasion of a constitutionally protected right or is a legislative measure which cannot be objectively justified?

It seems to me that, looked at in its entirety, the prosecution and the defence are in quite different positions and have quite different entitlements in the context of pre-trial applications to dismiss criminal proceedings. Where an application by an accused person to dismiss charges in the Circuit Criminal Court is unsuccessful, the accused has a number of options to him as follows:-

> (a) He can judicially review the decision
>
> (b) The Circuit Court Judge can state a case to the Supreme Court on a point of law at the request of an accused person;
>
> (c) The accused can raise the point again at his trial;
>
> (d) If the accused is unsuccessful when raising the point at his criminal trial and if he is convicted he can still appeal on the point to the Court of Criminal Appeal;
>
> (e) If unsuccessful in the Court of Criminal Appeal, the accused person can seek leave to appeal to the Supreme Court on a point of law.

These entitlements highlight some basic differences between the situation and respective functions of the prosecution and the defence. For example, if an accused person could appeal an adverse decision under s. 4 (E) to the Court of Criminal Appeal and was unsuccessful in that appeal, he would, if convicted at his trial, still have a further appeal to the Court of Criminal Appeal on the same point, thereby enjoying a double right of appeal to the same court on the same issue. It is difficult to see how conflicting legal interpretations on the same point by differently constituted divisions of the Court of Criminal Appeal could in consequence be avoided.

The need of the prosecution, based on its different role and situation, for such a right is clear and self-evident. A decision by the Circuit Court to dismiss a prosecution under s. 4 (E) (4) would mean that the prosecution would not have *any* recourse to the Court of Criminal Appeal were it not for s. 4 (E) (7) for the very simple reason that the prosecution would have terminated.

The legislation and particular section must be taken as enjoying a presumption of constitutionality. To give a right to one party is not to strip away a constitutional right from another. Procedural disparities may be appropriate to take account of the quite different considerations facing prosecution and defence and the absence of a right of appeal for a defendant will not necessarily offend the equality guarantee contained in Article 40.1 of the Constitution or otherwise amount to an unjust attack on an accused person's constitutional rights in circumstances where, objectively viewed in the light of the different role and function of the two parties, the legislative provision may be seen as necessary or desirable to address a legitimate concern.

In *Dillane v. Ireland* [1980] I.L.R.M. 167, criminal proceedings against the plaintiff were withdrawn in the District Court by the prosecuting garda with the permission of the District Court judge. The District Court had no power to award costs in favour of the plaintiff, then being a defendant, as rule 67 of the District Court Rules 1948 prohibited the District Court judge from awarding costs against a "member of the Garda Síochána acting in discharge of his duties as a police officer". The plaintiff claimed rule 67 was in breach of the equality guarantee contained in the Constitution and also that it failed to respect his property rights under Article 40.3.2. The High Court dismissed the plaintiff's claim and in dismissing the appeal, Henchy J. stated at p. 169:-

> "The effect of the rule, therefore, in its application to a case such as this, is that the District Justice may grant costs or witnesses' expenses to an accused if the person who prosecuted him is not a member of the Garda Síochána, but that he is debarred from making such an award if the prosecutor is a garda acting in the discharge of his duties as a police officer. It is the latter requirement for immunity from costs or witness expenses that in my opinion provides a valid constitutional justification, on the ground of social function, for the discrimination complained of between one kind of common informer and another. When the State, whether directly by statute or mediately through the exercise of a delegated power of subordinate legislation, makes a discrimination in favour of, or against, a person or a category of persons, on the express or implied ground of a difference in social function, the courts will not condemn such discrimination as being in breach of Article 40.1 if it is not arbitrary, or capricious, or otherwise not reasonably capable, when objectively viewed in the light of the social function involved, of supporting the selection or classification complained of. It seems to me to have been well within the law-making discretion allowed by Article 40.1 for the District Court Rules Committee to draw a distinction between, on the one hand, a common informer who is a garda acting in discharge of his duties as a police officer, and on the other, a common informer who is either a mere member of the public or a garda not acting in discharge of his duties as a police officer. Whether the court supports or approves of that distinction is irrelevant: what matters is whether it could reasonably have been arrived at as a matter of policy by those to whom the elected representatives of the people delegated the power of laying down the principle upon which costs are to be awarded."

It seems to me that the defendants have identified a legitimate interest which requires and justifies different treatment in this instance as between prosecution and defence. That interest lies in the need of the Director to ensure that a particular point is not resolved in this type of hearing without any right of appeal in circumstances where that decision may have implications for a wide number of cases and other prosecutions. That is never an interest to which an accused person need address his or her mind.

I am further satisfied that the legislative measure itself, insofar as it may be said to encroach on any right of the plaintiff, is proportionate having regard to the other rights enjoyed by an accused person both before trial, during the trial and subsequent to

any trial.

I am also mindful of the practical implications of any conclusion which would require that mutuality must obtain in this procedural aspect of criminal proceedings. The Court was informed during the hearing that resort to the Court of Criminal Appeal by the Director from a decision of a Circuit Court Judge under s. 4 (E) has only occurred in a handful of instances since 1999. In other words it is a right which has been exercised sparingly. It is not difficult to imagine that a similar right of appeal in favour of an accused person might be resorted to much more frequently in an effort to prevent a criminal trial from proceeding, or, at the very least to delay and stave off the actual criminal trial itself.

Finally, I do not regard the granting of a right of appeal to the prosecution in the circumstances outlined in this section as taking away any constitutional right to a trial in due process enjoyed by an accused person under Article 38.1 of the Constitution. All his trial rights remain intact. That is perhaps why counsel for the plaintiff, wisely in my view, refrained from invoking any decisions from the European Court of Human Rights in relation to rights of appeal, given that it was common case that those decisions referred to rights of appeal arising in the context of concluded trials and cases only.

In the recent case of *S.F. v Her Honour Judge Murphy & Ors* [2009] I.E.H.C. 497, Hedigan J refused a declaration that the Courts of Justice Act 1924, insofar as it fails to provide for an appeal to the Court of Criminal Appeal from a decision of a Circuit Court judge refusing costs to an applicant following a direction by the Circuit Court judge to direct the jury to acquit, was as a result invalid having regard to the provisions of the Constitution. At par 43 of his judgment Hedigan J noted:-

> "Reference was made by counsel for the Applicant to the fact that the statutory role of the Court of Criminal Appeal has been broadened by the enactment of s.24 of the Criminal Justice Act, 2006. This provision confers power on the Attorney General or the DPP, as appropriate, to appeal against an order of costs made in favour of an accused tried on indictment who has been acquitted. No argument was raised by counsel for the Applicant that this amounted to invidious discrimination in violation of Article 40 of the Constitution"

I would dismiss the plaintiff's claim herein.