Neutral Citation [2013] IEHC 210

THE HIGH COURT

Record Number: 2012 No. 174 JR

Between:

Shane Sweeney

Applicant

And

District Judge Lindsay and the Director of Public Prosecutions

Respondents

Judgment of Mr Justice Michael Peart delivered on the l6th day of May 2013:

1. Arising out of an incident in a pub in Galway on St. Patrick's Day 2011 the applicant and one Edward Ward were arrested and charged with an offence of assault causing harm.

2. Both cases were in due course listed before the respondent on the 3rd February 2012 for trial. When the cases were called, the first named respondent was informed that the applicant intended to plead guilty, whereas Mr Ward intended to plead not guilty.

3. The first named respondent proceeded with the trial of Mr Ward's case, during which the first named respondent stated that he considered the matter to be too serious to be dealt with summarily and indicated that he proposed to refuse jurisdiction, whereupon he was informed by the DPP that jurisdiction had already been considered and accepted by a different District Judge. The trial proceeded to a conclusion, and Mr Ward was acquitted.

4. The case against the applicant was then called. As noted already the applicant's solicitor had stated when the case was called that the applicant intended to plead guilty. Having heard the case against Mr Ward and having acquitted him, he then requested that the facts of the applicant's case be outlined. It appears that the first named respondent had by then seen CCTV footage of the incident during the evidence in the Ward case, and had also seen the medical reports in respect of the injuries sustained by the victim of the assault. Having heard those facts, the first named respondent refused jurisdiction and proceeded to adjourn the applicant's case for a Book of Evidence.

5. The second affidavit of Valerie Corcoran sworn on the 6th November 2012 gives more detail of exactly how matters proceeded before the first named respondent. She says that having heard some of the evidence in the Ward case the first named respondent raised the question of jurisdiction, and having been told that on a previous occasion jurisdiction had been accepted by Judge Fahy, proceeded to the conclusion of the trial. She states also that by the time he raised the question of jurisdiction the first named respondent had not viewed the CCTV footage of the incident.

6. Ms. Corcoran states that at no stage either before Judge Fahy, or on the 3rd February 2012 before the first named respondent, did the prosecuting Inspector indicate a view that the charge against the applicant was of a more serious nature than that in respect of Mr Ward. It appears according to her affidavit that when the first named respondent made his interjection about jurisdiction and was informed that jurisdiction had already been accepted by Judge Fahy, he consulted the file, saw that this was the case, and proceeded with the trial of Mr Ward.

7. Ms. Corcoran states that there was never any real distinction made by the prosecution or by the victim in his statement to the Gardai, which indicated that the case against the applicant was significantly more serious than that faced by Mr Ward.

8. Nevertheless having acquitted Mr Ward, the first named respondent proceeded to deal with the applicant on his guilty plea. When the case was called the first named respondent indicated that he had just heard the case against the applicant's co-accused and asked the prosecuting Inspector to outline the facts against the applicant. Following that, he indicated that he was refusing jurisdiction and adjourned the case for a Book of Evidence.

9. It is submitted for the applicant that having accepted jurisdiction in respect of the co-accused, Mr Ward, and refusing jurisdiction in respect of the applicant's case, the first named respondent has acted without jurisdiction and contrary to natural and constitutional justice and fair procedures. It is further submitted that having heard the case against Mr Ward, and having acquitted him, the first named respondent has acted capriciously and arbitrarily by determining that the applicant's case was one that was not fit to be dealt with summarily, since in almost every respect the facts of each offence were similar if not the same.

10. It is submitted that having accepted jurisdiction it was not open to the first named respondent to change his mind when it came to the case against the applicant, and that in doing so he acted without jurisdiction, and in a way that breaches the principle of equal treatment.

11. Bernard Condon SC for the applicant has relied principally upon the judgment of McCarthy J. in the Supreme Court in *Feeney v. District Justice John Clifford* [1989] IR. 668. In that case the applicant had appeared in the District court on four indictable offences which are capable of being tried summarily if it was the case that they were minor offences. Having heard an outline of the facts the respondent judge decided that they were minor offences and that they could be dealt with summarily. The applicant having been put on his election opted for summary disposal and pleaded guilty. Only at that stage did the respondent judge learn that the applicant was already serving two earlier sentences of imprisonment. The respondent indicated at that stage that he had been minded to impose a two year sentence in respect of the offences to which the applicant had pleaded guilty but, having regard to the existing sentences being served he was unable to impose the sentence he wished to impose. He therefore concluded that in such circumstances while the offences were still considered to be minor, they were not fit to be tried summarily and he sent the applicant forward for trial on indictment to the Circuit Court which would not be inhibited in the matter of such a sentence. The applicant failed in the High Court to have that order quashed. But his appeal to the Supreme Court was successful. In his judgment, McCarthy J. was satisfied that although not referred to in the order of the District Justice sending him forward, the fact was established that the plea

of guilty had been accepted and that it was only thereafter that the judge changed his mind as to the minor nature of the offences and their fitness to be dealt with summarily, having been informed of the fact that the applicant was then currently serving other sentences. That information which was received only following the acceptance of the guilty plea spoke only to penalty, and not to the nature of the offence, yet appeared to have persuaded the judge that it took each offence out of the category of being fit to be tried summarily.

12. Having expressed his sympathy for the predicament which was presented to the respondent having heard about the existing sentences and the impossibility of imposing the sentences he wished to impose, McCarthy J. went on to state:

> *" ... he sought to remedy the situation. In doing so he has identified what seems to be a serious omission in criminal procedure. Once there has been a plea of guilty to what appears to be, on the facts alleged, a minor offence fit to be tried summarily, there can be no going back on the conviction that necessarily follows the plea of guilty; the district justice cannot hold the plea in some form of forensic limbo, until he has heard the evidence material to penalty; yet there must be many such instances. "*

13. In the present case, there is no doubt that prior to hearing the evidence in the trial of Mr Ward who had pleaded not guilty, the first named respondent had been given an outline of the facts alleged against the applicant, and on the basis of what he had been informed at that stage, had decided that the offence was a minor offence and one that was fit to be tried summarily. He could have proceeded to impose sentence there and then, before going on to hear the case of the co-accused. Indeed, if the applicant was being tried alone and not in conjunction with his co-accused, he would, if he had pleaded guilty, been sentenced upon the outline of the facts given to him, and without the benefit of the evidence called in the case against any co-accused and without seeing the CCTV footage which seems to be what persuaded the first named respondent to change his mind about the offence being a minor offence. As Ms. Corcoran has averred, the prosecuting Inspector did not in his outline of the facts seek to make any distinction between the involvement of the applicant and that of Mr Ward. In such a way, there has been an element of chance involved which has militated against the applicant, since his sentencing post his plea of guilty awaited the trial of Mr Ward, which as things turned out led to the latter's acquittal. That enabled the first named respondent to hear and see evidence which caused him to change his mind about the nature and degree of seriousness of the offence to which the applicant had pleaded guilty.

14. Mr Condon has submitted that the first named respondent had no jurisdiction, having accepted the applicant's plea of guilty, to leave that in limbo, to use the words of McCarthy J. and then later change his mind and send the applicant forward for sentencing on his plea of guilty to the Circuit Court. It is also submitted that what occurred is unfair, capricious and arbitrary, and contrary to natural and constitutional justice.

15. He points to the fact that in the Circuit Court on indictment the maximum penalty which would be faced by the applicant is five years' imprisonment, whereas in the District Court that maximum is twelve months.

16. I should add at this stage that the applicant has also impugned the order sending the applicant forward on the basis of a breach of the principle of equal treatment, as this Court concluded in its own judgment in *Brehuta v. District Judge John Coughlan and DPP* [2012] IEHC 498. Without going into that argument in any detail, it is clear to me that the present case is very different on its facts. The present case is not a failure to treat differently two persons similarly situated. The various accused persons in Brehuta were identically situated as far as the offence was concerned. Their involvement on the facts was identical. That is not the case herein. The facts against each, or their respective involvements in the assault itself were not identical and the first named respondent was entitled to see their involvements as different. So on that discrete question, I do not believe that the applicant's argument is a good one.

17. But how does one reconcile the conclusions of McCarthy J. in Feeney v. District Justice John Clifford [supra] with the judgment of Henchy J. in *State (McEvitt) v. Delap* [1981] 1 IR 125 and that of Macken J. in the Supreme Court in *Reade v. Judge Michael Reilly* [2010] 1 IR. 295 -two cases relied upon by Eilis Brennan BL on behalf of the respondents?

18. Ms. Brennan argues that those cases are authority for the proposition that having accepted jurisdiction for summary disposal, the District Judge is not just entitled, but in fact required, to stop the trial if during the course of the trial the judge becomes of the view that in the light of the unfolding evidence the offence is not a minor offence and is not one fit to be tried summarily, since the jurisdiction vested by statute in the District Judge to deal with an offence summarily is confined to a minor offence considered fit to be tried summarily? This is in spite of the fact that having heard an outline of the facts of the case at the outset he/she considered that it was a minor offence capable of summary disposal.

19. Ms. Brennan has submitted that the first named respondent had jurisdiction to deal with the applicant's case only if he was satisfied that the offence was a minor one and fit to be dealt with summarily. She submits that once he was of the view that this was not the case, he was devoid of jurisdiction thereafter and simply could not dispose of it summarily, and that it would have been unlawful for him to do so. She has submitted that for this Court to quash the order sending the applicant forward would in effect be forcing the first named respondent to act without jurisdiction.

20. *State (McEvitt) v. Delap* upon which the respondent relies was a case where the accused was charged with what both he and the DPP considered to be a minor offence. The respondent District Justice proposed to try him summarily. However, the accused informed the District Justice that he wished to be tried by a jury even though it was a minor offence, on the basis that under the Constitution he was entitled to be tried by a jury. O'Higgins C.J. was satisfied that the accused person had no entitlement to insist on a trial by jury in circumstances where the offence was a minor offence. So, that was the context of that case, which is of course very different to the present case. Henchy J. agreed (as did Parke J) that there was no entitlement to trial by jury on the offence which was accepted as being a minor offence. The offence in question was one which could be tried summarily if minor, and if not minor, on indictment in the Circuit Court. Henchy J. stated in that regard:

> *" ... the line of distinction between one court and the other is necessarily the gravity of the offence. If, as is the case here, the circumstances of the offence charged plainly show it to be a minor offence, it must be assumed from the provision in the Act of a penalty for a summary conviction that the legislature intended that the District Justice will try the case as part of the exercise of the constitutional jurisdiction of the District Court to try minor offences, rather than send it forward for trial as if it were not a minor offence.*
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> *If this were a case where it had not been agreed that the offence were a minor one, the District Justice could make a provisional or prima facie ruling that it was a minor one, if the prosecution's opening statement of the circumstances justified such a tentative conclusion. But if, as the hearing proceeded, it appeared that the offence was not a minor one, the District Justice would have to desist from the summary hearing and, instead, take the necessary steps to allow a*

conversion of the case into the procedures laid down by the Criminal Procedure Act, 1967 for the preliminary examination of an indictable offence. "

21. It is the last of the above two paragraphs on which Ms. Brennan for the respondent relies upon in the present case for her submission that even though the first named respondent may have appeared to accept jurisdiction by accepting the applicant's guilty plea at the outset when both cases were called, it was open to him to determine, having heard the entire evidence in the Ward case that was common to both offences, that in fact the offence against the applicant was not a minor offence.

22. Turning to the judgment of Macken J. in *Reade v. Judge Michael Reilly* [supra], that was a case where the applicant, like McEvitt and Ward, had been charged with a so-called hybrid offence, and the District Judge having received a synopsis of the case from the prosecutor formed the view that the offence was a minor offence. The DPP sought summary disposal, and the District Judge accepted jurisdiction. In due course the case came on for trial, the accused having pleaded not guilty. However, during the course of the evidence given by the complainant victim he changed his mind and refused to hear any further evidence, decided to refuse jurisdiction, and sent the case forward to the Circuit Court for trial there before a jury.

23. A number of issues arose for determination, but relevant to the within proceedings, it was argued that the decision as to the minor nature of the offence was a decision by which he was bound once he had made it, and that he had no power to change it thereafter. The applicant argued also that the procedure was unfair, as rather than having the charges disposed of summarily in the District Court, he now faced a trial by jury in the Circuit Court. The facts are similar to the present case, except that in the present case the District Judge changed his mind only after he heard some evidence in the trial of Mr Ward, rather than in the trial of the applicant.

24. Clearly on the authority of *State (McEvitt) v. Delap* the first named respondent could have halted the trial of Mr Ward at any stage if on hearing the evidence he was satisfied that the offence was not a minor one in the light of the evidence given, and he could have refused jurisdiction at that point and sent Mr Ward forward. But he did not so decide in respect of Mr Ward. In fact he went on to acquit him. The question for present purposes is whether he was precluded from changing his mind in respect of the applicant's case, based on evidence which he heard and saw in the Ward case, and after the applicant had indicated that he intended to plead guilty.

25. It is clear from the judgment of McCarthy J. in *Feeney v. District Justice John Clifford* that his judgment in that case is not in conflict with *State (McEvitt) v. Delap*. In fact, he endorsed the views expressed by Henchy J. but indicated a limitation to its application. In that regard he stated:

"I would endorse these views as so expressed but point out that they are confined to cases where a district justice, having come to the immediate opinion that the facts alleged constitute a minor offence or minor offences, may later change his mind on hearing the facts in more detail. If he does later conclude that the facts proved take the case out of the category of minor offence, then he must discontinue the summary trial and proceed in accordance with the provisions of the Criminal Procedure Act, 1967. "

26. So, there is no discord between between those two judgments when their respective contexts are taken into account. The judgment of McCarthy J. in *Feeney* was in the context of an accused where the offence was a minor one and to which the accused pleaded guilty after the district judge had been given an outline of the facts of the case. It was subsequently only that the judge was informed that the accused was serving two sentences, and in those circumstances he changed his mind as to the minor nature of the offence and sent the accused forward so that what he considered an appropriate sentence could be imposed. It was in such circumstances that McCarthy J. concluded that it was too late and not possible for the judge to reconsider whether the offence was minor. It is clear that the previous sentence history of the accused could not speak to whether or not the offence in question was a minor offence or one that should be dealt with on indictment. He had been given an outline of the facts of the case and had then been satisfied on that basis that it was a minor offence. There is nothing in that judgment to indicate that in *Feeney* McCarthy J, was saying that if that accused had pleaded not guilty and his trial proceeded on a summary basis, the judge could not, having heard some or all of the evidence, concluded that he should change his mind about the minor nature of the offence, and send the accused forward on indictment. In fact it is clear from the passage which I have just quoted in paragraph 25 that he was in agreement that this was what the judge could and should do. So, there is no distinction on this point to be drawn between the Feeney case and the *State (McEvitt) v. Delap*.

27. The question in the present case is whether the first named respondent had, having been given an outline of the facts of the case against the applicant, reached a decision that it was a minor offence, and accepted jurisdiction, and in such circumstances accepted the guilty plea of the applicant, and if so, whether he could later change his mind on the question of jurisdiction once he had heard the evidence and seen the CCTV footage in another man's trial, namely that of the co-accused, Mr Ward. If he had accepted jurisdiction having had the facts outlined to him by the prosecuting Inspector, and if thereafter the accused had then pleaded guilty, and if the judge had simply left over sentencing until after the trial of the co-accused, I would consider that it was not within jurisdiction to change his mind later on after he had heard evidence in the case of the co-accused, as it would offend against what was stated by McCarthy J. in Feeney in the passage already quoted above as follows:

" Once there has been a plea of guilty to what appears to be, on the facts alleged, a minor offence fit to be tried summarily, there can be no going back on the conviction that necessarily follows the plea of guilty; the district justice cannot hold the plea in some form o((orensic limbo, until he has heard the evidence material to penalty" [my emphasis).

28. It seems to me that in such circumstances, the applicant's case would be finally concluded, except for sentence.

29. But the question is what is the evidence of exactly what happened up to the point when the first named respondent commenced the trial of the co-accused who had pleaded not guilty. Some questions arise. Had he been given an outline of the facts against the applicant before he commenced the hearing of the trial of the co-accused? If not, was there any basis on which he could consider whether the offence was a minor one? Did the solicitor for the applicant when the case was called simply inform the judge that the applicant intended to plead guilty? If it was only after the case against the co-accused concluded that the judge was first given an outline of the facts against the applicant, it seems to me that it was only at that stage that the first named respondent first gave consideration to whether the offence against the applicant, as opposed to the co-accused, was a minor one. It is true that during the trial pf the co-accused he stated that the offence was a serious one and was then informed that Judge Fahy had already accepted jurisdiction, and he proceeded further with the trial, and in fact acquitted the co-accused on the evidence which he had seen and heard. But the fact that Judge Fahy had already accepted jurisdiction would not be sufficient to bind the first named respondent, either in the case of the co-accused or the applicant. He could decide that matter himself in the light of his own assessment. Neither in my view is the fact that he continued with the trial of the co-accused having been informed that jurisdiction

had been accepted by Judge Fahy, sufficient to prevent the first named respondent from reaching a different decision in respect of the applicant when given an outline of the facts alleged against the applicant.

30. I should add that simply because both accused are charged with the same offence does not mean that because it is considered a minor offence against one accused, a different view cannot be taken in respect of the other. The respective roles of each can be considered in relation to a consideration of the seriousness of the offence. Clearly the first named respondent having seen and heard the evidence against the co-accused concluded that he had a relatively low level of involvement, if any, since he acquitted him. Equally, he seems to have considered that the involvement of the applicant was significant and more serious, and in the light of the medical report in respect of the victim, that it was not a minor offence, hence he sent him forward on indictment, despite his plea of guilty.

31. The decision on the present application in my view turns on what occurred up to the time when the trial of the co-accused commenced. At paragraph 4 of her affidavit sworn to ground this application for leave to seek judicial review Ms. Corcoran avers that when both cases were first called at the District Court on the 3rd February 2012 she "*advised the first respondent that the applicant intended to plead guilty to the charge .....*" (my emphasis). She goes on in that paragraph to state that the first respondent then proceeded to hear the case against the co-accused, Mr Ward in respect of whom she had informed that he intended to enter a plea of not guilty.

32. At paragraph 6 of the same affidavit, Ms. Corcoran then avers that having concluded the co-accused's case and having acquitted him of the charge, the first respondent then "*took up the applicant's case*", and that he called upon the prosecuting Inspector to outline the facts alleged in the applicant's case. She goes on to state that having heard those facts as outlined, the first named respondent refused jurisdiction. He had of course, as already stated, seen for himself the CCTV footage during the trial of Mr Ward, and the medical report on the victim. I have already stated that I do not consider that the first respondent was bound to accept jurisdiction because Judge Fahy had already made such a determination. The first named respondent was entitled to form his own view of the matter, since he is without any jurisdiction to hear the case summarily unless he considers that the case is a minor offence.

33. There are no further averments which are relevant to what occurred when the case was first called or when the case against the applicant was taken up at the conclusion of Mr Ward's trial. Ms. Corcoran swore a second affidavit in response to a replying affidavit sworn by Inspector Glynn who was the prosecuting inspector on behalf of the DPP on the 3rd February 2012, but her second affidavit deals mainly with what the inspector says about the facts alleged against each accused.

34. I am satisfied first of all that the first named respondent was entitled to reach his own view as to whether the offence with which the applicant was to be tried was one that could be dealt with summarily. I am also satisfied that on the 3rd February 2012 when the case was first called, he was told only that the applicant intended to plead guilty, and that at that point he knew little if anything of the facts of the case. Accordingly at that point he certainly was not in a position to make any decision as to whether the case against the applicant was one that he could deal with summarily, and did not do so. It is not a case therefore where the judgment of McCarthy J. in *Feeney v. District Justice John Clifford* to which I have referred earlier can assist the applicant. The facts are sufficiently different for that case to be easily distinguished.

35. What happened thereafter was simply that he proceeded to hear the case against Mr Ward who was pleading not guilty. Obviously as the evidence unfolded the first named respondent began to have doubts as to whether the offence against Mr Ward was a minor offence, but having been told that Judge Fahy had accepted jurisdiction he proceeded to hear further evidence. Up to that point the first respondent had not viewed the CCTV footage. By the end of the trial of Mr Ward he had obviously become satisfied that Mr Ward should be acquitted altogether, and that was the verdict given.

36. I fail to see any unfairness, arbitrariness or caprice in a situation where the first respondent at the close of the trial of the co-accused, having heard the evidence in relation to the fracas in so far as it was given to him in the case against Mr Ward, and having had the benefit of seeing the CCTV footage of the incident, then asks the prosecution to give him an outline of the facts alleged against the applicant, decides that the case against the applicant is not one that can be dealt with summarily. In fact for him to have dealt with the case against the applicant in such circumstances would have been to act without any jurisdiction, since the condition for such jurisdiction was not fulfilled. Simply because one accused's trial proceeded to a conclusion by way of summary disposal did not bind the first respondent in respect of the conclusion that two persons similarly situated have been dealt with differently or unequally. While the two charges arose out of the same incident, it was open to the first respondent to form the view that the involvement of each accused person was different in degree, and to refuse jurisdiction having had the facts alleged against the applicant outlined to him.

37. For these reasons I am satisfied that the applicant is not entitled to any of the reliefs sought, and I refuse his application.