Neutral Citation: [2015] IEHC 615

THE HIGH COURT

[2015 No. 1600 S.S.]

BETWEEN

JAKE FREEMAN

APPLICANT

AND

GOVERNOR OF WHEATFIELD PRISON

RESPONDENT

EX TEMPORE JUDGMENT of Mr. Justice Noonan delivered the 9th day of October 2015.

1. This is an Article 40 application in which the minor applicant challenges the validity of his detention on foot of a conviction in the Children's Court, on the 28th of September, 2015, of an offence contrary to s. 15 of the Misuse of Drugs Act 1977 as amended. He received a sentence of four months imprisonment in the District Court in respect of that offence. Under the terms of s. 27 of the 1977 Act, persons charged with an offence under s. 15 may be tried summarily or on indictment and different penalties apply in each instance. The issue of where the accused is tried is a matter for the Director of Public Prosecutions and if she directs summary trial in the District Court that is subject only to the District Judge being satisfied that the offence is a minor one. It is not in dispute that the Director directed that there should be a summary trial in this case or that the District Judge considered the offence to be a minor one. However, the warrant on foot of which the applicant was committed to prison makes no reference to the determination of the Director that this matter be tried summarily. The applicant says that this is a fatal flaw in the warrant which goes to jurisdiction and renders it bad on its face.

2. There are many offences created by statute which may be tried summarily or on indictment and it is well settled that the choice of venue is solely a matter for the Director. If summary trial is directed, the accused has no right to insist on trial by jury, - see *The State (McKevitt) v. Delap* [1981] I.R. 125. In the case of some other types of offence, including scheduled offences under the Criminal Justice Act 1951, the accused may opt for summary trial on being informed of that right, subject to the District Judge being satisfied that the offence is minor and to the consent of the prosecutor to summary trial. Counsel for the applicant places particular reliance in this case on the *State (Kiernan) v. Governor of Mountjoy Prison* (High Court unreported 19th February, 1973), a decision of Finlay J. (as he then was) sitting in the High Court. In that case the applicant was charged with perjury, a scheduled offence under the 1951 Act, and s. 2(2) provided that he could be tried summarily if three conditions were fulfilled:-

> (1) the court was of opinion that it was a minor offence fit to be tried summarily;
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> (2) the accused being informed of his right to trial by jury did not object to a summary trial; and
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> (3) the Attorney General consented to the summary trial.

3. The applicant was duly convicted in the District Court and, on appeal in the Circuit Court, was sentenced to three months in prison. Although it was common case that the three conditions were in fact satisfied, the warrant did not recite, on its face, the consent of the Attorney General. Finlay J. quashed the warrant following the decision of the Supreme Court in the *State (Browne) v. Feran* [1967] I.R. 147. In that case the accused was convicted of a scheduled offence, following a summary trial, where only the first two conditions needed to be satisfied, that is to say that, first, the District Judge considered the offence to be minor and fit to be tried in the District Court and secondly that the accused did not object. Here again it was common case that the accused had in fact been informed of his right to jury trial and did not object to summary trial but this was not recited in the warrant which was held to be bad as a consequence. In the course of giving his judgment Finlay J. said (at p. 5):-

> "In general I can see no distinction in principal between the consent of the Attorney General and the objection of the accused. The presence of one and the absence of the other are equally essential to the summary trial of a person charged with perjury. If the absence of objection by the accused must in order to make a valid order be recited in it as the case of State (Brown) v. Feran so clearly decides I can see no reason why precisely the same principle does not apply to a recital of the consent of the Attorney General. I therefore conclude that the Justice's minute and the order as made pursuant to it in this case are bad on their face and must be quashed."

4. In *State (DPP) v. O'hUadhaigh* (High Court unreported 29th July, 1983), which I shall refer to as *O'hUadhaigh* No. 1, two accused persons were charged with an offence contrary to The Children Act 1908 which could be tried summarily or on indictment. The Director of Public Prosecutions directed trial on indictment but the District Judge said that he intended to proceed summarily as venue was a matter for him. As a result, the Director sought an order of prohibition from the High Court to prevent the trial proceeding. In the course of his judgment, in that case, Gannon J. said at p. 7:-

> "The jurisdiction of the District Court is not in issue. It is determined by legislation and apart from s. 2 of the Criminal Justice Act 1951 and the schedule thereto it does not extend to indictable offences. The offence created by s. 12 of the Children Act 1908 is one which is declared by the section to be a misdemeanour but may be triable either summarily or on indictment. It is competent therefore for a complainant or prosecutor to invoke the summary jurisdiction of the District Court for the trial of a charge preferred under that section. Alternatively the complainant or prosecutor may proceed by indictment whereupon the procedure set out in Part 2 of the Criminal Procedure Act 1967 must be followed. Section 51 of the 1967 Act is ample for an offence such as is created by s. 12 of the 1908 Act. Section 7 and 8 of 1967 Act set out the functions to be performed by the District Justice and subs. 4 of s. 8 is the only one pertinent to the issues sought to argued on this application. It is obvious however that a complainant or prosecutor being obliged to invoke either the summary jurisdiction of the District Court or the investigative functions of the District Justice preliminary to preferring an indictment must clearly indicate to the District Justice which function of the court he is invoking."

5. Accordingly, the court, in that case, appears to have been of the view that it was the determination of the Director to proceed summarily in such cases that conferred jurisdiction on the District Court. In the *State (DPP) v. O' hUadhaigh* (High Court unreported 30th January, 1984), a decision of O'Hanlon J. which I will refer to as *O'hUadhaigh* No. 2, the accused was charged with an offence under the Offences Against the Person Act 1861 which was a scheduled offence under the 1951 Act and thus the DPP's consent was necessary for summary trial. Consent was not forthcoming but the District Judge nonetheless proceeded to try and convict the accused. O'Hanlon J. quashed the conviction and in the course of his judgment at p. 3 he said the following:-

> "Having regard to the fact that the Act only conferred jurisdiction on the District Court to deal summarily with such offences where a plea of guilty has been entered if the consent of the Director is forthcoming there was in my opinion an onus on the District Justice to satisfy himself that the necessary consent had been obtained before he proceeded to impose sentence. As the Director did not consent and as his representative did not state that he was consenting the learned District Justice inadvertently acted without jurisdiction in proceeding to deal summarily with these two offences and in proceeding to impose on the accused the maximum sentence permitted under the provisions of the Act of 1951 as amended by the Act of 1967 namely a sentence of twelve months imprisonment on each of the two charges."

6. In the *State (Comerford) v Kirby* (High Court unreported 23rd July, 1986), a decision of Barron J., the accused was charged with knowingly allowing himself to be conveyed in a stolen vehicle contrary to s. 112 of the Road Traffic Act 1961 as amended, an offence triable either summarily or on indictment. The District Judge proceeded to try the offence summarily and, at the close of the prosecution case, the accused sought a direction on the grounds that the Director of Public Prosecutions had not consented to the summary trial. The District Judge refused this application on the basis that he was aware that the DPP had issued a blanket consent to such trials taking place in the District Court. Accordingly the District Judge proceeded to convict the accused and impose an eight month sentence of imprisonment. Barron J. refused to quash the conviction holding that the evidence of consent of the DPP was not an essential proof, distinguishing the judgment of O'Hanlon J. in *O'hUadhaigh* No. 2 and, in the course of giving his judgment in that case, Barron J. said (at p. 4):-

> "The *State (DPP) and O'hUadhaigh* is a different case from the present [*referring to O'hUadhaigh No. 2*]. There the offence was an indictable offence which could be tried summarily by virtue of the provisions of s. 22 of the Criminal Justice Act 1951 as amended. It was an essential proof of that section that the Director of Public Prosecutions had consented to the defendant being so tried. No such statutory requirement exists in the present case. The present case is dependent upon the consideration of the principles established in the *State (McKevitt) v Delap* and the *Attorney General (O'Connor) v O'Reilly*. Both cases deal with the rights of the accused to control the court of trial. Each uphold the sole right of the prosecution to determine this matter. Neither deals with the manner in which the prosecution must elect but it follows that if this is of no concern of the defence then such election need not be expressed in any particular way. If so then it is not a necessary proof. Accordingly there is nothing required of the prosecution vis-à-vis the defence which can result in a failure to prove its case nor is there anything affecting s.112(2) which provides that in any particular circumstances the court before which the charge is brought should refuse jurisdiction.
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> The real issue in these proceedings is one of jurisdiction. If the matter is brought by way of complaint before the District Justice as a matter of summary jurisdiction he does not lose jurisdiction to hear the matter because there is no evidence before him of the election of the Director to such procedure. Equally in the absence of such evidence the Circuit Court will not lose jurisdiction if the procedure adopted is to seek a return for trial to that court."

7. I was also referred to the dicta of Peart J. in *Turner v Governor of Mountjoy Prison* [2014] IEHC 387. This was a case in which there were a number of grounds attached to the warrant, some of which were no longer relevant and appear to have been included as a result of clerical error. The judge said the following at para. 13:-

> "They are basic clerical errors, but I do not believe that they constitute errors such as, in some other cases, where a warrant does not indicate that a person has been put on his election prior to being disposed of summarily, which undermine the integrity of the warrant. In such a case the warrant fails to disclose on the face of the warrant the jurisdiction of the District Judge to deal with the case at all."

8. Mr. McDonagh S.C., on behalf of the applicant, says that this case is on all fours with *Kiernan* and the failure to recite the consent or decision of the Director in relation to summary trial in the warrant is equally fatal here. Ms. Lawlor B.L., for the respondent, argues that the rationale of *Kiernan* is entirely distinguishable as it was concerned with a specific statutory procedure for summary trial which has as a prerequisite for the conferring of jurisdiction the consent of the Attorney General which was thus a necessary proof. The respondent relies on the judgment of Barron J. as authority for the proposition that the consent of the Director to summary trial is not an essential proof and does not in fact confer jurisdiction on the District Court. Thus its absence from the warrant is immaterial.

9. It is not in dispute that, in a case such as the present, the accused is brought before the District Court on foot of a charge sheet whether he is to be tried summarily or by a jury. He cannot know the form of trial he faces until such time as the Director's decision in that regard is conveyed to the District Judge. It is settled law that the decision on venue is one for the Director and her alone. It is only subject to the District Judge's determination that the offence is minor. As *O'hUadhaigh* No. 1 makes clear, it is not until the Director invokes the relevant jurisdiction that the trial can proceed. It seems to me beyond argument that if the Director has determined that the accused be tried by jury, the District Judge cannot embark on a summary trial and, were he or she to do so, any resultant order would be quashed for the asking. That can only be for the reason that in such circumstances the District Judge has no jurisdiction to try the accused. I cannot see how any other construction is possible. It must follow as a matter of logic that if the Director has made no decision one way or the other equally the District Judge has no jurisdiction. As Gannon J. said in *O'hUadhaigh* No. 1 it is the decision of the Director that invokes the relevant jurisdiction and accordingly is an essential ingredient to the exercise of that jurisdiction. Absent such decision by the Director, there is simply no jurisdiction, in my view, vested in the District Court.

10. In this respect I am conscious of the fact that I am coming to a conclusion which is different from that arrived at by Barron J. in *Comerford*. I do so with great reluctance and with the greatest deference and respect for a court of such immense distinction. However, in doing so, I must have regard to the fact that, whilst *O'hUadhaigh* No. 2 was considered by Barron J. in that decision, the court's attention appears not to have been drawn to *O'hUadhaigh* No. 1 or indeed, it would appear, to the decision of Finlay J. in Kiernan. Although I take the point that Kiernan concerned a scheduled offence under the 1951 Act and mandated the consent of the Attorney before summary trial could be embarked on, I can see no difference, in principle, between the District Court's jurisdiction being founded on an express statutory requirement for the consent of the Attorney General and it being founded on the decision of the Director to prosecute summarily. Even though it is of no legal concern to the accused which option the Director elects for, insofar as the accused cannot influence that decision, I do not think it can therefore be said that the Director's decision is not a necessary proof because, in its absence, there could be no summary trial.

11. For these reasons, therefore, I am of the view that the failure to record, on the face of the warrant, in this case, the decision of the Director to proceed by way of summary trial is a fatal flaw which renders the warrant bad. I must, therefore, order the release of the applicant.