

THE HIGH COURT

2018 No. 41 SS

**IN THE MATTER OF SECTION 52 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961
DIRECTOR OF PUBLIC PROSECUTIONS
(AT THE SUIT OF GARDA FERGUS GRANT)**

Prosecutor

– and –
MIHAI NICOLAE

Accused

JUDGMENT of Mr Justice Max Barrett delivered on 1st October, 2018.

1. This judgment concerns a consultative case stated by a judge of the District Court. The relevant portion of the consultative case stated states as follows:

"[1] The Accused, has been charged as set out on charge sheet 17559127 with an offence contrary to section 2 of the Criminal Justice (Public Order) Act 2011 the particulars of which are that he was begging in such a manner as to harass, intimidate or obstruct members of the public....

[3] The facts as proved or admitted or agreed and as found by me were as follows:

a. The Accused is charged before the court with an offence contrary to section 2 of the Criminal Justice (Public Order) Act 2011.

b. The Accused does not have any previous convictions in this jurisdiction.

c. Prior to the Accused's appearing before the District Court, his solicitor had sent correspondence to the relevant Gardaí...stating that his client wished to accept his guilt in respect of the allegation, but that, given the minor nature of the charge he wished to be dealt with under the Adult Caution Scheme.

d. The Court Sergeant informed the court that the Adult Caution Scheme is only available to a person who has been charged with a Scheduled Offence and that as the Accused had not been charged with such an offence he was not entitled to the benefit of the scheme.

e. The Adult Caution Scheme is a diversion scheme that is routinely employed by Gardaí in respect of first-time offenders. The application of this Scheme is left to the discretion of Gardaí, namely the local Garda Superintendent.

f. The Adult Caution Scheme is only available to an offender in respect of the following list of offences [which does not include the offence with which the Accused is charged]....

[4] I was of the opinion that in light of the minor nature of the charge in question; of the Accused's willingness to accept responsibility at an early stage for the offending; and of the circumstances of the Accused including his lack of previous convictions, that it was desirable that such a Scheme be extended to cover the charge in question....

[5] Being of the opinion that it was desirable to refer the questions of law set out hereunder to the High Court for its determination, I seek the determination of the said questions of law by the High Court....

[6] Accordingly, I seek the determination of the High Court on the following questions:

a. Whether, in the circumstances outlined above, the Accused...having been charged and prosecuted with an offence contrary to section 2 of the Criminal Justice (Public Order) Act 2011, had been treated unequally to accused persons against whom other minor offences are alleged.

b. Can a Judge of the District Court give a direction to members of An Garda Síochána to apply the Adult Caution Scheme to a non-Schedule Offence that is before the court or is the Adult Caution Scheme something that the District Court can have absolutely no role in?

c. Whether, if the answer to (a) is yes, the effect of this inequality was such as to render the prosecution of the accused unfair and such that the matter should be struck out or discontinued by the District Court?"

2. Section 52(1) of the Courts (Supplemental Provisions) Act 1961 provides that: "A Justice of the District Court shall, if requested by any person who has been heard in any proceedings whatsoever before him (other than proceedings relating to an indictable offence which is not being dealt with summarily by the court) unless he consider the request frivolous, and may (without request) refer any question of law arising in such proceedings to the High Court for determination." Commenting on this provision in O'Malley, T., *The Criminal Process* (2009), para.23.46, the learned author observes that "[A] condition precedent to the stating of a consultative case is that the requesting party must have been heard in the relevant proceedings. The question must concern a matter of law that is directly relevant to the proceedings. In fact, it appears that the court should hear all the evidence connected with the particular point and make the necessary findings of fact before stating the case." The learned District Judge in the matter at hand did not require evidence to identify which offences are scheduled for the purposes of the Adult Caution Scheme. Notably, however, the case stated appears otherwise to be stated without the benefit of any evidence. In this regard the court recalls, in addition to the just-quoted observations, the following observations of Lynch J in *DPP (Travers) v. Brennan* [1998] 2 ILRM 129, 131-2 (see also *Folen & ors v. Garavan* [2002] 2 ILRM 127 and the consideration therein of *Doyle v. Hearne and ors* [1987] IR 601):

"It appears that no evidence was heard by the district judge before stating the case. In so far as he has purported to find facts this has been done only on the basis of an opening statement by the Garda conducting the prosecution perhaps with interventions from the defending solicitor. The proper procedure leading to the stating of a consultative case for the opinion of the superior courts is for the district judge to hear all the evidence relevant to the point of law arising; to find the facts relevant to such point of law in the light of such evidence; then to state the case posing the

questions appropriate to elucidate the point of law; and finally on receiving the answers to those questions to decide the matter before him on the basis of those answers."

3. As well as the evidential deficit presenting, the court notes that, per Geoghegan J. in *People (DPP) v. Dougan* [1996] 1 IR 544, 549 (see also in this regard *DPP (Stratford) v. O'Neill* [1998] 2 IR 383), "[A] District Court judge is not entitled to state a case to the High Court on a question of the validity of a statutory provision having regard to the Constitution". This is because "he can obviously only state a case on questions which he himself would be entitled to decide independently of the case stated. The mere fact...that the High Court is given jurisdiction under this Constitution to determine a question of the constitutionality of a statutory provision does not mean that this can be done by way of case stated". Though Geoghegan J. refers only to "a statutory provision", it seems to the court that his reasoning must apply, by analogy, in respect of an administrative scheme. Here what is before the court is, at least in part, a query as to constitutionality, offering a further basis, in addition to the evidential deficit, as to why the court should not entertain the consultative case stated now before it.

4. For the reasons aforesaid, the court finds itself coerced as a matter of law into respectfully concluding that it would be inappropriate for it, in the circumstances, to address the questions posed.