Neutral Citation Number: [2011] IEHC 8

THE HIGH COURT

JUDICIAL REVIEW

[2010 No. 483 J.R.]

BETWEEN

EAMONN DILLON

APPLICANT

AND

JUDGE DAVID McHUGH, THE DIRECTOR OF PUBLIC PROSECUTIONS AND THE JUDGES OF THE DUBLIN CIRCUIT CRIMINAL COURT

RESPONDENTS

JUDGMENT of Kearns P. delivered the 14th day of January, 2011

In this case leave to bring judicial review proceedings quashing the return of the applicant for trial to the Dublin Circuit Court was granted by the High Court (Peart J.) on 21st April, 2010.

The grounds upon which leave was granted usefully summarise the issues which have arisen in this case. They are as follows:-

> "1. The applicant stands charged before the Dublin Circuit Criminal Court with the offence outlined in the indictment to Bill Number DU 302/09 namely the offence of arson contrary to s. 2 of the Criminal Damage Act 1991 alleged to have been committed on 1st September, 2007.
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> 2. The Director of Public Prosecutions directed summary disposal of the matter but the District Judge refused jurisdiction and on 18th February, 2009, following the preparation of a book of evidence the applicant was sent forward by the first named respondent for trial before the Dublin Circuit Criminal Court.
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> 3. The case was listed for mention from time to time in the Circuit Criminal Court and was thereafter listed for trial on 14th February, 2010. By letter the second named respondent indicated that he proposed to enter a *nolle prosequi* in the matter arising from a decision of the Supreme Court. However the second named respondent subsequently resiled from that position on the basis of another Supreme Court decision and has indicated an intention once more to prosecute the applicant.
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> 4. The section 2 criminal damage charge with which the applicant is charged is a "hybrid" offence triable either summarily or on indictment at the instance of the Director of Public Prosecutions.
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> 5. In the case of *Reade v. Judge Reilly* [2009] I.E.S.C. 66 the Supreme Court ruled that the District Court has no jurisdiction to send a person forward for trial in such circumstances and therefore the Circuit Criminal Court had no jurisdiction to deal with the purported indictment laid against the applicant and has no jurisdiction to further deal with the case.
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> 6. In the case of *Gormley v. Smyth* [2010] I.E.S.C. 5, though taking a different line in relation to hybrid offences, the Supreme Court expressly respected the decision in *Reade* and that decision is binding precedent.
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> 7. Notwithstanding the foregoing, having indicated an intention to enter a *nolle prosequi*, it was incumbent upon the Director of Public Prosecutions to do so and the failure to honour that commitment or understanding was unfair and prejudicial.
>
> 8. Without prejudice to the foregoing, it is and it would be unfair and prejudicial to the applicant to permit the continuation of the proceedings against him."

Turning first to the grounding affidavit of the applicant sworn on 20th April, 2010, the applicant states that he first appeared before the District Court in Tallaght on 26th November, 2008, charged that on 1st September, 2007, at the Esso garage at Grange Road, Rathfarnham, Dublin he did commit arson in that he did at such location damage by fire a car wash to the value of €76,386 contrary to s. 2 of the Criminal Damage Act 1991. The second named respondent elected for the summary disposal of the case and such direction was communicated to the court. However, on 26th November, 2008, the District Court Judge took the view that the matter was not a minor offence fit to be tried summarily and he refused jurisdiction. Various adjournments then ensued until the book of evidence was ultimately served on the applicant on the 18th February, 2009, on which date he was returned for trial before the Dublin Circuit Court.

On its face, the order sending the applicant forward for trial is an order made under s. 4A (1) of the Criminal Procedure Act 1967 and the order specifically recites that "the Director of Public Prosecutions consents to the accused being sent forward for trial and the documents specified in section 4B (1) of the Act have been served on the accused".

The applicant states his belief that he should not have been sent forward for trial in this way by the first named respondent and that the District Court Judge had no option other than to strike out the matter when he determined that it was not a minor offence fit to be tried summarily. The applicant further deposes to his belief that in the particular circumstances there was no jurisdiction to send the case forward to the Circuit Criminal Court or for the judge to otherwise deal further with the matter.

As a more comprehensive account of what subsequently ensued appears in the affidavit sworn on behalf of the respondents by Mr.

Brendan McCarthy, a legal executive in the office of the second named respondent, I now turn to that account, the relevant portions of which disclose the following facts.

On 29th July, 2009, the Supreme Court delivered a judgment in the case of *Reade v. District Judge Reilly and The Director of Public Prosecutions* [2009] I.E.S.C. 66, [2009] 2 I.L.R.M. 467. That judgment raised serious issues about the validity of returns for trial in the case of offences described as "hybrid offences".

The nature of the difficulty appears from the following passage from the judgment delivered on behalf of the Court by Macken J. in which she stated at p. 16 of [2009] I.E.S.C. 66 and at p. 482 of [2009] 2 I.L.R.M. 467:

> "Under the provisions of the Act of 1951 (i.e. the Criminal Justice Act, 1951) the District Court judge is vested with a statutory power, once he has concluded that an indictable offence is not apt to be tried on a summary basis, to send an accused forward for trial and direct the service of a book of evidence. Analogous statutory provisions exist in relation to similar offences where created by other legislation of a similar nature. This flows from the natural logic of any statutory scheme for the disposal of indictable offences on a summary basis, and from specific statutory provisions vesting such powers in the District Court judge. Different considerations arise in relation to hybrid offences, where no such specific power is provided by statute. I have been unable to find any statutory general power vested in the District Court or in a District Court judge, which permits any equivalent order to be made in the case of non minor hybrid offences where the District Court judge has properly declined jurisdiction, and no such statutory power was drawn to this Court's attention by counsel on behalf of the second named respondent. Although all the academic writings, including Walsh on Criminal Procedure, and Woods on District Court Practice and Procedure in Criminal Cases, as well as the Report of the Working Group on the Jurisdiction of the Courts state that the District Court judge must send an accused forward for trial if he considers the offence, in the case of a hybrid offence, not to be a minor offence, it is not at all clear on what basis this is stated. …
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> Since the District Court judge is obliged to decline jurisdiction, there is clearly an actual power vested in him to strike out the proceedings, as the appellant contends, as being the only consequence which can flow from the determination that the offence is not a minor offence. I am of the view that, in the absence of a statutory power to do anything further, this is the correct conclusion. It does not, of course, prevent the second named respondent from commencing proceedings again in respect of the offence, on an indictable basis."

This judgment became the subject matter of urgent submissions from both sides to the Supreme Court seeking clarification as to the implications for the validity of returns for trial from the District Court in respect of so-called hybrid offences in circumstances akin to those which had arisen in the *Reade* case. It is perhaps of some importance to record the fact that the District Court Judge in the *Reade* case never made any order returning the accused for trial but had simply declined jurisdiction on the basis the offence was a non-minor offence and adjourned the matter for service of a book of evidence so that a trial could take place before a jury at Galway Circuit Court.

It would appear, however, that on 17th December, 2009, the Supreme Court stated only that the judgment delivered on 29th July, 2009, stood in its existing terms and that no further clarification was appropriate or necessary.

Returning to Mr. McCarthy's affidavit, he states that on 15th October, 2009, the matter was for arraignment in the Circuit Criminal Court at which point a trial date for the applicant's case was fixed for 10th February, 2010.

By letter and fax dated 20th January, 2010, on a date some weeks after the Supreme Court considered the further submissions, the second named respondent wrote to the applicant stating that in the light of the *Reade* decision and the response of the Supreme Court made in relation to the additional submissions in December, 2009, it was felt the Director should either enter a *nolle prosequi* or move to quash the return for trial. The letter made it clear, however, whichever course was chosen, the outcome would be the same in that the applicant would be charged with the same offence and would face trial on indictment.

On 21st January, 2010, the second named respondent communicated to the Superintendent of An Garda Síochána in Tallaght Garda Station that as a result of the decision in *Reade* the prosecution proposed to enter a *nolle prosequi* and that the trial arranged for 10th February, 2010, would accordingly be vacated. This had the unfortunate consequence that all witnesses had to be notified they were not now required and would be contacted at some later date in relation to the giving of evidence.

On 28th January, 2010, a judgment was delivered on behalf of the Supreme Court by Geoghegan J. in *Gormley v. District Judge Smyth and the Director of Public Prosecutions* [2010] I.E.S.C. 5 which held that if a hybrid offence came before the District Court and the District Judge declined jurisdiction, he could nonetheless validly return an accused person for trial unless the making of such a return resulted in oppression, abuse of process or unfair procedures insofar as the accused was concerned.

I will return in greater detail to this judgment at a later stage, but for present purposes it suffices to record that, following delivery of judgment in the *Gormley* case, the second named respondent concluded that the return for trial which had been made in the present case was in fact valid and that he should therefore no longer proceed with the course of entering a *nolle prosequi*. It was also decided that a new trial date would be sought.

Thereafter the case was listed for mention in the Circuit Court on 10th March, when it was adjourned to 27th April, 2010, for the purposes of fixing a new trial date. However, on 21st April, 2010, the applicant sought and obtained leave to bring the present judicial review proceedings.

RELEVANT STATUTORY PROVISIONS

The relevant terms of s. 2 of the Criminal Damage Act, 1991 are as follows:-

> "(1) A person who without lawful excuse damages any property belonging to another intending to damage any such property or being reckless as to whether any such property would be damaged shall be guilty of an offence.
>
> (5) A person guilty of an offence under this section shall be liable—
>
> (a) on summary conviction, to a fine not exceeding €1,269.74 or imprisonment for a term not exceeding 12 months or both, and
>
> (b) on conviction on indictment—

(i) in case the person is guilty of arson under subsection *(1)* or *(3)* or of an offence under subsection *(2)* (whether arson or not), to a fine or imprisonment for life or both, and

(ii) in case the person is guilty of any other offence under this section, to a fine not exceeding €12,697 or imprisonment for a term not exceeding 10 years or both."

It will be seen from the foregoing that this section contemplates two alternative modes of trial and specifies the penalties on conviction for each such mode of trial. It is for this reason that offences capable of being processed in this way have become known as "hybrid offences".

I should say at the outset that it is to my way of thinking a most unfortunate term to describe procedures for dealing with criminal offences, conjuring up as it does the image of some hydra-headed species of offence previously unknown to our legal system. That is simply not the case. The introduction of a two way system for prosecuting indictable criminal offences is procedural and not substantive. That fact is not reflected in the expression "hybrid offences". The inappropriateness of the term "hybrid" is apparent from the definition of the adjective in the *Concise Oxford Dictionary (9th Ed.)* where it is defined as meaning "bred from different species or varieties". However, as Geoghegan J. pointed out in *Gormley v. District Judge Smyth and the Director of Public Prosecutions* [2010] I.E.S.C. 5 at p. 3:-

> "When analysed, however, this is a purely procedural categorisation and not a substantive one."

In England, an offence of the type alleged in the instant case is more happily described as an "offence triable either way", that is to say triable either on indictment or summarily.

The relevant parts of s. 4A of the Criminal Procedure Act 1967 (as inserted by s. 9 of the Criminal Justice Act 1999) are as follows:-

> "(1) Where an accused person is before the District Court charged with an indictable offence, the Court shall send the accused forward for trial to the court before which he is to stand trial (the trial court) unless –
>
> (a) the case is being tried summarily,
>
> (b) the case is being dealt with under s. 13
>
> (c) the accused is unfit to plead.
>
> (2) The accused shall not be sent forward for trial under subsection (*1*) without the consent of the prosecutor.
>
> (3) Where the prosecutor refuses to give a consent required under subsection (*2*) in relation to an indictable offence, the District Court shall strike out the proceedings against the accused in relation to that offence.
>
> (4) The striking out of proceedings under subsection (*3*) shall not prejudice the institution of proceedings against the accused by the prosecutor.
>
> (5) The accused shall not be sent forward for trial under subsection (*1*) until the documents mentioned in s. 4B (1) have been served on the accused."

DISCUSSION AND DECISION

While I have in a sense been invited by both sides to 'elect' as between two decisions of the Supreme Court or regard myself as bound by the earlier decision of that Court, I have no intention of formulating my decision along any such lines, not least because the Supreme Court itself in the more recent of the two cases carefully distinguished the facts of each case. There are significant differences in the facts of those two cases and I do not believe the doctrine of *stare decisis* ties my hands in the particular manner suggested by counsel on behalf of the applicant.

Counsel on behalf of the applicant urged the Court to adopt the view that the facts of the applicant's case are identical to those which pertained in *Reade v. District Judge Reilly and the Director of Public Prosecutions* [2009] I.E.S.C. 66, [2009] 2 I.L.R.M. 467. As already noted, the court in that case held that there was no statutory provision which specifically enables the District Judge to send the applicant forward for trial in the case of a so-called hybrid offence where the District Judge has declined jurisdiction.

In *Gormley v. District Judge Smyth and the Director of Public Prosecutions* [2010] I.E.S.C. 5, the Supreme Court noted that in the *Reade* case the Director had unequivocally elected for a summary trial. That trial was only aborted because, after changing his mind more than once, the District Court Judge decided it was a non minor offence. Secondly, there had been no suggestion in the *Reade* case that the Director of Public Prosecutions was given any option or even the opportunity to argue what should happen.

However, in the *Gormley* case, the Director had directed a trial on indictment in circumstances where the District Court Judge had been told, erroneously as it subsequently transpired, that the Director had consented to the summary disposal of the charges. Geoghegan J. was of the view that where the Director had directed a trial on indictment it made no sense to hold in such circumstances that the prosecution had to be struck out with no further order.

While noting that the jurisdiction to conduct a summary trial was statutory only, Geoghegan J. nonetheless continued at p. 20:-

> "This undoubtedly means that the Court does not have an inherent jurisdiction (though the exact meaning of that expression is none too clear). In my view, this does not mean that every act done by a District Court judge in the course of lawfully sitting in the District Court is unauthorised unless there is an express statutory provision permitting it. It is true he is confined to the statutory jurisdiction but in exercising that statutory jurisdiction there can be and are necessary inherent powers.
>
> There is no doubt that a purely statutory court such as the District Court has no inherent jurisdiction to conduct any form

> of criminal or civil litigation without express statutory authorisation. That proposition, which has always been accepted, does not mean that a judge of the District Court does not, in the carrying out of his or her function, has (sic) no inherent procedural powers which he or she is entitled to exercise."

Having cited the relevant provisions of s. 4A (1) of the Criminal Procedure Act, 1967, Geoghegan J. concluded that the Oireachtas had expressly told the judge of the District Court to do what he did. The appellant was "before the District Court and charged with an indictable offence" in that the offence, as in the present case, was capable of being tried on indictment. He continued:-

> "That being so, the judge was obliged to send the appellant forward for trial to the Circuit Court because none of the exempting conditions applied. The case was no longer being tried summarily even if it ever was validly tried summarily. The case was not being dealt with under section 13 of the 1967 Act and the appellant was not unfit to plead. I am not clear that there was any gap to be filled in the procedure so as to enable the judge to take the steps of sending the case forward for trial on indictment in slightly unusual circumstances, but if there is any argument that can be made to that effect, it would seem to me that the District Court judge clearly had the necessary implied or inherent powers."

Geoghegan J. thus concluded that when a hybrid offence is before the court and it becomes clear that, with the approval of the Director of Public Prosecutions, it has to be tried upon indictment for whatever reason, that the District Court Judge should be seen as having the requisite power to take the necessary steps to achieve that result.

While at first blush the present case may appear to have more of the features of the case of *Reade v. District Judge Reilly and the Director of Public Prosecutions* than the case of *Gormley v. District Judge Smyth and the Director of Public Prosecutions*, I am of the view that in fact this case more closely resembles the *Gormley* case.

In the *Gormley* case a consent to summary disposal had erroneously been notified to the District Court Judge. That error was subsequently rectified. In the instant case it appears that while the Director initially sought summary disposal, he nonetheless later consented to the return for trial which was actually made.

I was somewhat surprised that greater attention in the course of submissions from both sides to this Court did not focus on ss. 4A (2) and (3) of the Criminal Procedure Act 1967, which specifically provide that an accused shall not be sent forward for trial under subsection (1) without the consent of the prosecutor and that where the prosecutor refuses to give the consent required under subsection (2) in relation to an indictable offence, the District Court shall strike out the proceedings against the accused in relation to that offence. That provision is important because it is the only scenario in which a striking out procedure is addressed by the section. It suggests to me that the section clearly does not mean that this course is obligatory in all circumstances where the District Court Judge declines jurisdiction but rather that it is mandatory only in the scenario expressly set out in the section.

This is not a case where there was, at the time of the return, no consent from the prosecution to a return for trial in the Circuit Court. Indeed it is expressly stated on the face of the order of the District Court that there *was* such consent and that fact has not been challenged in these proceedings. In my view this fact must be seen as meaning precisely the same thing as an election or direction to the same effect, albeit that the prosecution at an earlier stage was content that the case be disposed of summarily. The fact that the Director can change his mind, as one must assume occurred in this instance, is well settled and is dealt with separately at a later point in this judgment. The fact of the consent demonstrates compliance with the requirements of the section. In those circumstances there was no obligation on the District Court Judge to strike out the proceedings as has been suggested on behalf of the applicant. That obligation arises only where, at the time of the proposed return, the prosecutor *refuses* to give the consent required under subsection (2) in relation to an indictable offence.

Nor is this a case to which one of the exempting provisions of s. 4A (1) of the Act of 1967 apply.

For the sake of completeness, I would quite separately and independently be of the view that the more general reasoning in the judgment of Geoghegan J. as to the powers of judges of the District Court under s. 4A is correct. It provides an interpretation of the section which is sensible and practical and which enables that provision of the Act of 1967 to operate and function in an effective manner.

I am satisfied the requisite powers for the return made in this case are to be found within the provisions of s. 4A of the Criminal Procedure Act 1967 and that any suggestion to the effect that the Criminal Justice Act 1951 supplied enabling provisions to so order which are somehow absent or lacking in the Act of 1967 is mistaken. Section 2 (3) of the Act of 1951 simply states that "this section shall not prevent the court from sending forward a person for trial for a scheduled offence". This negative provision does not confer any positive power on the District Court to do anything and in my view could not be relied upon as the source of the power in question. That power is to be found within s. 4A of the Act of 1967 and I am satisfied that the return for trial in this case was validly made for the reasons set out above.

Finally, I reject out of hand the suggestion that the second named respondent is estopped or precluded from adopting the course he has chosen to take on the basis that to do so is somehow unfair and prejudicial. Cases such as *Eviston v. Director of Public Prosecutions* [2002] 3 I.R. 260 and *Carlin v. D.P.P.* [2010] I.E.S.C. 14 make it abundantly clear that the Director is entitled to change his mind about whether or not to prosecute a particular case. No question of oppression, unfair procedures, prejudice or unfairness can be invoked or relied upon by the applicant to halt this prosecution, particularly in circumstances where in correspondence with the applicant's solicitor the respondent had made it clear that, whatever procedural course required to be adopted, the applicant would still face prosecution on the particular charge.

I would therefore refuse the relief sought herein.