

THE HIGH COURT

[2006 No. 1637 S.S.]

IN THE MATTER OF THE COURTS (SUPPLEMENTAL)

PROVISIONS ACTS 1961, SECTION 52

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS
AT THE SUIT OF GARDA THOMAS M.G. QUIGLEY

PROSECUTOR

AND
TONY MONAGHAN

ACCUSED

Judgment of Mr. Justice Charleton delivered the 14th day of March, 2007

Introduction

1. This case stated arose out of a brawl on 13th August, 2004 in a public house called Teach John Joe's at Eachléim near Béal an Mhuirthead in County Mayo. As it is quite common with these instances, the alleged assailant, and those who claimed to have been assaulted by him, have ended up each blaming the other. The two charges against the accused are of assaulting John Gallagher, the proprietor, contrary to s. 2 of the Non-Fatal Offences Against The Persons Act, 1997 and of engaging in disorderly conduct on a licensed premises contrary to ss. 8(1) and (3) of the Intoxicating Liquor Act, 2003. After the proper issue of summonses, the case came on for hearing on 12th October, 2005 in County Mayo.

2. When John Gallagher, gave evidence as to what had happened in his premises, he was asked by the defence as to whether he had ever complained about the accused's conduct. He had indicated that he had never made a formal complaint to the Gardaí about the accused. The trial got as far as the direction stage. Up to that point, it would appear, evidence had been given of an assault on John Gallagher by the accused; of him throwing a punch at another barman; of a glass flying across a counter; of a stool being banged on the ground; of the accused holding an ice bucket in air, then banging it down on the counter; followed by a thrown punch which Mr. Niall Geraghty, another barman, had sidestepped; and another witness gave evidence of the accused walking around through the premises and bumping into people. The submission from the defence solicitor seeking a direction was that the prosecution case was fundamentally flawed as there was no evidence of any formal complaint having been made by Mr. Gallagher, or indeed anybody, against the accused: this was claimed to be a basic requirement in a summary prosecution.

3. After an adjournment to 5th December, 2005 for the purpose of taking written submissions, lengthy explanations were proffered as to how the matter went to the Director of Public Prosecutions' office and how he had decided, on reviewing the files, that the appropriate person to charge was, in fact, the accused. This might be regarded as surprising because, as this narrative disclosed, it was the accused who had complained on 18th August, 2004 that someone had assaulted him. The replying submission from the State solicitor was to the effect that it was not necessary to have a complaint from anyone prior to initiating a criminal process and, further, that the first person in the door of the Garda station should not have an advantage in determining who, if anyone, should be prosecuting arising out of an apparent breach of the criminal law.

4. Arising from the foregoing, Judge Mary C. Devins has stated a case for the opinion of the High Court, dated 1st November, 2006 on one question:-

"Can an accused person be prosecuted summarily for a non-fatal offence against the person in circumstances where the decision to prosecute is based on evidence gathered pursuant to a complaint made by the accused himself and no formal complaint has been made against the accused?"

The Law

5. Article 30.3 of Bunreacht na hÉireann provides:-

"All crimes and offences prosecuted in any court constituted under Article 34 of this Constitution other than a court of Summary Jurisdiction shall be prosecuted in the name of the People and at the suit of the Attorney General or some other person authorised in accordance with law to act for that purpose."

6. The complex provisions of law whereby the District Court assumed its jurisdiction, through a variety of various enactments giving certain individuals, and even societies, a power to prosecute should not detain us here. Rather, it is the function of the Director of Public Prosecutions, who under the Prosecution of Offences Act, 1974 took over the function of the Attorney General, as regards prosecutions, that is at issue. Every time the Director of Public Prosecutions initiates a prosecution it is, in the wording of the Constitution "in ainm an Phobail". Individuals retain a limited right to prosecute as common informers up to the point where summary jurisdiction ceases: thereafter the case must be taken over as a jury trial by the Director of Public Prosecutions, or it ends. In the District Court, members of An Garda Síochána may prosecute as common informers but they do so in the name of the Director of Public Prosecutions, as was done in this case. His authority does not need, perhaps, to be sought in every individual case as his power to control prosecutions may be delegated in respect of relatively minor matters, through a list or other arrangement of an administrative kind.

7. The validity of a prosecution does not depend upon the existence of a complaint, no more than the validity of a return for trial depends upon evidence being available to the Circuit Court or High Court of the accused having been arrested and charged; *The People (D.P.P.) v. Kelleher* [1998] 2 I.R. 417.

8. As the Constitution implies, it is the community's rights that are paramount in the prosecuting of criminal offences. The commission of a crime often creates a victim, sometimes one who is dead and not enabled therefore to complain or to play any part in initiating a prosecution. Where the victim is alive, the legal order dictates that their rights are subsidiary to those of the community. The accused is presumed to be innocent of any crime in respect of which a complaint might be made and that presumption is as valid where there is a complaint, as where there is no complaint. Hence, the Oireachtas have devolved on to the Director of Public Prosecutions the important function of examining documents concerned with the apparent commission of criminal offences and deciding who is, or who is not, to be prosecuted. Every crime constitutes an attack upon the legal order which the community has established. It is therefore not only the accused who has rights that must be protected once a prosecution has initiated; the

community, as well, have an interest in the fair and prompt disposal of criminal cases. In *B. v. D.P.P.* [1997] 3 I.R. 140, Denham J. stated at 195-196:-

"It is not the applicant's interests only which have to be considered. It is necessary to balance the applicant's right to reasonable expedition in the prosecution of the offences with the community's right to have criminal offences prosecuted."

9. In fulfilling his function, the Director of Public Prosecution is not to be obliged to give reasons for his decision as to whether to prosecute or not unless it can be demonstrated that such a decision was made in bad faith or under the influence of an improper motive or policy; *The State (McCormack) v. Curran* [1987] I.L.R.M. 225. Partly, the reasoning behind the series of decisions which later upheld that principle may be based on public policy in the sense that for reasons to be given as to why a prosecution should not be initiated, for instance due to lack of evidence, or the loss of evidence, such a declaration might undermine the presumption of innocence in favour of the accused. In addition, an extra administrative burden might be unjustifiably thrust upon the office of The Director of Public Prosecutions in explaining, and then defending, every decision made pursuant to the powers vested in the office by the Prosecution of Offences Act, 1974. Once there is a reasonable possibility that a valid decision has been made by the Director not to prosecute, or to prosecute, a decision by the Director is not reviewable by the High Court; *H v. D.P.P.* [1994] 2 I.L.R.M. 285. The Director is not exempt from the general constitutional requirements of fairness and fair procedures. The proof of the absence of such principles in any decision made by the Director of Public Prosecutions cannot be gathered through a speculative application for discovery; *Dunphy (a minor) v. D.P.P.* [2005] I.E.S.C. 75. There must be, at the least, evidence suggestive of an impropriety before the court would allow a proceeding for discovery to be initiated against the Director of Public Prosecutions.

10. An exception may arise where a decision has been communicated to an accused person that they will not be prosecuted but where that decision has been changed in favour of prosecution without the existence of any fresh evidence; *Evison v. D.P.P.* [2002] 3 I.R. 260. In that case the applicant was told that she was not to be prosecuted in respect of a fatal road traffic accident but, following the receipt of a letter, an internal review was initiated which caused the decision to be reversed. It had been explained by the Director of Public Prosecutions that an internal review had caused the reversal of the decision. The Director cannot be called upon to explain his decision or to give the reasons for it or to explain the sources of information on which it is based. But, where a decision has been communicated and then withdrawn, the absence of fair procedures may make the decision reviewable. It would be otherwise where the review was conducted within the internal administration as a means of checking files and the correctness of decisions reached thereon, and only communicated when a final decision had been made.

11. Both *Bunreacht na hÉireann* and the European Convention on Human Rights protect the bodily integrity of citizens. Clearly, where someone is subject to an assault, their personal rights are infringed. Article 8 of the European Convention on Human Rights protects the private and family life of individuals from unnecessary interference. It provides:-

"1. Everyone has the right to respect for his private and family life, his home and his correspondence

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

12. Article 41 of *Bunreacht na hÉireann* provides:-

"1. The State recognises the family as the natural primary and fundamental unit group of society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

2. The State, therefore, guarantees to protect the family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State

13. In *The People (D.P.P.) v. J.T.*, (1988) 3 Frewen 141, the accused was charged with incest against his mentally handicapped daughter. In order to prove paternity, the prosecution called his wife; something which was not allowed at common law and was not within the relevant statutory exception. The relevant provision of common law was struck down by the Court of Criminal Appeal, acting as branch of the High Court, on the basis that the failure to protect the family unit, from an attack within, by maintaining a rule of law which lessened the possibility of a fair disposal of the case undermined the rights of family members. At p. 159 Walsh J. stated:-

"The Constitution places upon the courts the obligation to enforce the protection given to the family and family life by the Constitution itself. That must necessarily include an obligation to enforce these protective provisions even against members of the family who are guilty or alleged to be guilty of injuries to members of the family.

It would be difficult to consider or to imagine any matter which would be more subversive of family life than sexual offences committed against his child by a spouse of the nature alleged in the present case particularly when the child in question is less than fully normal. It is obviously the duty of one spouse to protect the child or children against the other in cases of such abuse, and it would completely frustrate the obligation placed upon the State to protect the family if the very person upon whom the obligation is said to rest should be prevented or inhibited from testifying in a prosecution against the offending spouse. This is particularly so in the circumstances where a spouse whose testimony it is sought to introduce is a vital witness. Insofar as the justification sought for the existence of the rule is the prevention of family dissension, it can quite clearly have no validity in a situation where the application of the rule is so far from preventing dissension, is assisting in concealing in effect, and thus permitting to go unpunished, a serious offence committed upon members of the family by other members of the family, particularly sexual offences by a father upon his own daughter. In view of the sense of obligation placed upon this Court to assist insofar as it can in the protection of the family the Court must take the view that the maintenance of the common law rule relied on in this case would be failure to comply with the obligations imposed by the Constitution. This is all the more so in cases of assault upon the children of the family by the parents. Such a case should not be more hampered in its proof by the existence or the enforcement of the rule than in the case of an assault by the husband upon the wife.

14. A complaint is not required, as a matter of law, either under the Convention or under the Constitution, before the Director of Public Prosecutions initiates a criminal prosecution. Such a provision, were it to exist in law, would likely be struck down as inconsistent with *Bunreacht na hÉireann*. In the case *X and Y v. The Netherlands* (application no. 8978/80), judgment given at Strasbourg on 26th March, 1985, the similar provision of Dutch law was struck down by the European Court of Human Rights. The

victim of the crime, Ms. Y was mentally handicapped. She was woken up in the middle of the night and forced into the room with Mr. B. where she was made to undress and to have sexual intercourse with him. The Dutch criminal code required a complaint from her but this became impossible under Dutch law. Mr. X, the father of Ms. Y filed the complaint with the Dutch police in his capacity as father because, as he said, she could not do so herself "since, although, sixteen years of age, she is mentally and intellectually still a child". The European Court of Human Rights held that a legal provision requiring a complaint in those circumstances constituted a failure by the Netherlands to protect the integrity of Ms. Y's family life under Article 8.

15. The courts exist to serve the people. To effectively serve the community, the courts must have rights of compulsion. It is never a case that someone can choose or not to co-operate with a court, or co-operate with a tribunal. If they fail to do, they are committing a grave criminal offence and perhaps deserve severe punishment. Democracy operates through the consent of those who are governed and, from this consent, no one is entitled to dissent in such a way that will attack the very basis of government through the courts. Irrespective, therefore, as to whether a complaint has been lodged against a specific party or not, the Gardaí are entitled to investigate both crimes and suspected crimes and the Director of Public Prosecutions is entitled to bring prosecutions against those whom he regards as being potentially responsible. At p. 160 of *The People (D.P.P.) v. J. T.*, Walsh J. pointed out that it is the legally compellable duty of every person residing in Ireland to obey any Summons to appear before a court or tribunal and to give evidence thereat:-

"Attention should also be drawn to the fact that the Administration of justice itself requires that the public has a right to every man's evidence except for those persons who are privileged in that respect by the provisions of the Constitution itself 'or other established and recognised privilege.' (See the judgment of this Court in *Re Kevin O'Kelly* [1974] 108 I.L.T.R. 97). It was pointed out by the Supreme Court in the case of *Murphy v. Dublin Corporation and The Minister for Local Government* [1972] I.R. 215 that it would be impossible for the judicial power under the Constitution, in the proper exercise of its functions, to admit any other body of persons to decide for it whether or not certain evidence should or would be disclosed or produced in Court. In the last resort the decision lies with the Courts so long as they have seisin of the case. The exercise of the judicial power carries with it the power to compel the attendance of witnesses, the production of evidence and, a fortiori, the answering of questions by the witnesses. This is the ultimate safeguard of justice in the State, whether it be in pursuit of the guilty or in vindication of the innocent. It was pointed out in that case that there may be occasions when different aspects of the public interest may require a resolution of a conflict of interest which may be involved in the non-disclosure of evidence but that if there is such conflict then the sole power of resolving it resides in the courts.

Conclusion

16. The above cited decisions emphasise that the community is the ultimate party wronged when a crime is committed. It is therefore unnecessary that any one should complain of being the victim, whether an apparent crime is prosecuted summarily or on indictment. The fact that a different person has complained than the person ultimately prosecuted, or the fact that the person who first complains is himself or herself prosecuted, does not affect the ultimate interest of the community. The Director of Public Prosecutions, in bringing the case, acts in the name of the people. Once a prosecution has been initiated, or indeed a civil case or a proceeding before a tribunal, it is the duty of every person residing within the jurisdiction to co-operate and give their evidence. Failure to do so is a serious criminal offence which may deserve punishment as it strikes at the root of one of the basic functions of democracy.

17. I would therefore advise the learned District Judge that an accused person can be prosecuted summarily where the decision to prosecute is based on evidence gathered pursuant to a complaint made by the accused himself and, further, that it is not necessary that a formal complaint should be made against any accused person before a prosecution is initiated