

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

– AND –

MARTIN FEEHAN

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 21st March, 2018.

I

Background Facts and Reliefs Sought

1. These proceedings arise out of an allegation that the respondent committed three offences of dangerous driving causing serious harm on 16th February, 2015. It is alleged that the respondent was driving a van which collided with a truck as their lanes merged on the Mallow-Cork road. It is alleged that the respondent moved onto the wrong side of the road in the face of incoming traffic and that this precipitated a five vehicle accident. Serious injuries, including a brain injury, were suffered by a young woman as a result.

2. Following the accident, a garda investigation took place. Following that investigation, a Chief Superintendent purported to direct that the respondent be charged with three charges of dangerous driving causing serious harm. This direction was made without a file being submitted to the office of the Director of Public Prosecutions.

3. There is, as it happens, provision for members of An Garda Síochána to direct prosecutions in certain circumstances without previous submission of a file to the Director of Public Prosecutions. This arrangement is governed by s.8 of the Garda Síochána Act 2005 and certain directions made thereunder by the Director of Public Prosecutions. There is no provision whereby members of An Garda Síochána may direct a charge of dangerous driving causing serious harm without submitting a file to the office of the Director of Public Prosecutions.

4. On 18th July, 2015, summonses were applied for alleging the three offences, returnable to Cork District Court on 10th November, 2015. The respondent was tried before the District Court on 21st March, 2016. He was legally represented, was convicted and fined €500 and disqualified from driving for two years on one of the summonses. The other two summonses were marked as having been taken into consideration.

5. On 4th April, 2016, District Court orders were drawn up which incorrectly indicate that the respondent was sentenced to dangerous driving having pleaded guilty to the offences. Notably, and it is of some note, the orders also incorrectly suggested that the Director of Public Prosecutions had consented to the offences being tried summarily; in fact she never did so.

6. Following conviction, the respondent lodged an appeal to Cork Circuit Criminal Court against both conviction and sentence. That appeal is currently pending before Cork Circuit Criminal Court.

7. On 18th July, 2016, a file was forwarded to the office of the Director of Public Prosecutions in relation to the case. The State Solicitor had received the file as the respondent had brought an appeal to the Circuit Court (which would normally be dealt with by the State Solicitor). Directions were sought of the Director of Public Prosecutions in relation to the file. The directing officer in the office of the Director of Public Prosecutions initially understood that the respondent had been convicted of dangerous driving *simpliciter* and, in July 2016, directed no prosecution for dangerous driving causing serious harm. [Dangerous driving *simpliciter* under s.53 of the Road Traffic Act 1961, as inserted by the s.4 of the Road Traffic (No 2) Act 2011 is a summary-only offence. However, where the prosecution charges dangerous driving causing harm or serious injury, it is an indictable offence. Section 53, as amended, provides, *inter alia*, as follows:

"(1) A person shall not drive a vehicle in a public place in a manner (including speed) which having regard to all the circumstances of the case (including the condition of the vehicle, the nature, condition and use of the place and the amount of traffic which then actually is or might reasonably be expected then to be in it) or is likely to be dangerous to the public.

(2) A person who contravenes subsection (1) commits an offence and –

(a) in case the contravention causes death or serious bodily harm to another person, he or she is liable on conviction on indictment to imprisonment for a term not exceeding 10 years or to a fine not exceeding €20,000 or both, and

(b) in any other case, he or she is liable on summary conviction to a class A fine or to imprisonment for a term not exceeding 6 months or to both...".

In *Attorney General (Ward) v. Thornton* [1964] IR 457 held that s.53, as was, but the proposition holds good today, establishes a single offence. What is dual, or rather alternative, is the mode of prosecution, with the prosecution to choose which course it proposes to follow.]

8. On 6th October, 2016, it came to the attention of the directing officer that the District Court had purported to convict the respondent of the offence of dangerous driving causing serious harm, following 'not guilty' pleas. This had previously come to the attention of the State Solicitor as a result of interactions with An Garda Síochána. At this point, the directing officer sought the opinion of counsel on how best to proceed.

9. In January 2017, counsel furnished an opinion to the office of the Director of Public Prosecutions indicating that the issue was

covered by a decision of the High Court in *DPP v. Ó'Buachalla* [1999] 1 I.L.R.M. 362 and that the appeal could proceed. However, it subsequently came to the attention of the directing officer that the decision in *Ó'Buachalla* had been overturned by the Supreme Court in an *ex tempore* decision of that court which, surprisingly, had not been widely reported and of which counsel was understandably unaware as a consequence. An approved note by counsel of that *ex tempore* judgment, as initialled by the then Chief Justice, has been furnished to the court and the text of same is appended hereto for the sake of completeness. When it was realised that the decision of the Supreme Court had issued a further opinion was obtained of counsel; that opinion advised that the within application be brought.

10. It is the intention of the Director of Public Prosecutions to prosecute the respondent on indictment on a single charge of dangerous driving causing serious harm. It is the view of the Director of Public Prosecutions that even had it been legally possible to prosecute the charges against the respondent on a not guilty plea, in all the circumstances of the case summary trial would not have been appropriate (given the seriousness of the accident). The Director of Public Prosecutions accepts that the delay in bringing the proceedings is regrettable but explainable (the above background facts offering the explanation). The Director of Public Prosecutions does not accept that there is prejudice to the respondent caused by the delay. Counsel for the Director suggested at hearing that the fact of the initial trial is a matter that can be relied upon at sentencing (in the event that a conviction is secured) following the proposed prosecution on indictment. Finally, the Director of Public Prosecutions considers that the balance of justice justifies the granting of the reliefs that she now seeks. Those reliefs are as follows:

- (i) an order of *certiorari* quashing the orders of the learned District Court judge dated 21st March, 2016, and made in Cork District Court convicting and sentencing the respondent on three charges of the offence of dangerous driving causing serious harm on 16th February, 2016, the subject-matter of case numbers 2015/132613, 2015/132615 and 2015/132616;
- (ii) an order of prohibition against the judges of Cork Circuit Court from hearing the appeal of the respondent currently before that court against the orders of the learned District Judge dated 21st March, 2016, made in Cork District Court convicting and sentencing the respondent on three charges of the offence of dangerous driving causing serious harm on 16th February, 2015, the subject-matter of case numbers 2015/132613, 2015/132615 and 2015/132616;
- (iii) an order pursuant to O.84, r.21(3) of the Rules of the Superior Courts 1986, as amended (RSC), extending time for the bringing of an application for leave to apply for judicial review;
- (iv) an order pursuant to O.84, r.20(8) of the RSC staying the appeal of the respondent currently before Cork Circuit Court against the orders of the learned District Judge dated 21st March, 2016, made in Cork District Court convicting and sentencing the respondent on three charges of the offence of dangerous driving causing serious harm on 16th February, 2015, the subject matter of case numbers 2015/132613, 2015/132615 and 2015/132616;
- (v) an order remitting the charges before Cork District Court to be dealt with in accordance with law; and
- (vi) certain ancillary reliefs.

II

Ó'Buachalla

11. So far as the substantive reliefs sought by the Director of Public Prosecutions in the within application are concerned, it seems to the court that the decision of the Supreme Court in *DPP v. O'Buachalla* (Unreported, 10th December, 1999; see the appendix hereto for the note by counsel of the judgment given) provides a complete answer as to the applicable law and identifies the appropriate way for the court to proceed.

12. In *Ó'Buachalla*, the defendant was charged with dangerous driving causing serious harm. As here, he was prosecuted summarily in error for an indictable offence. He contested the charge and was convicted without anyone noticing that the offence was only triable on indictment. The Director of Public Prosecutions sought to quash the decision by *certiorari*. The High Court refused the relief sought. This was overturned on appeal, the Supreme Court holding, *inter alia*, that (1) once the accused pleaded 'not guilty', the District Court was deprived of all jurisdiction to deal with the matter summarily, (2) the District Court acted manifestly without jurisdiction and that if the matter was allowed to rest, the Circuit Court would hear an appeal but without jurisdiction to do so; and (3) no question of estoppel arose.

13. As it was in *O'Buachalla*, so it is here.

III

Delay

14. Order 84, rule 21 of the Rules of the Superior Courts provides for the time limits in bringing an application for judicial review. The within application is out-of-time unless the court grants an extension of time under O.84, r.21. An extension is only permissible under that latter provision where the court is satisfied that

"(a) there is good and sufficient reason for doing so, and

(b) the circumstances that resulted in the failure to make the application for leave within the [standard] period...either

(i) were outside the control of, or

(ii) could not reasonably have been anticipated by

the applicant for such extension."

15. Additionally, under O.84, r.21(4), "In considering whether good and sufficient reason exists for the purposes of sub-rule (3), the court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a respondent or third party."

16. It seems to the court that the fact and substance of the Director of Public Prosecution's view as to the desirability of a prosecution of the respondent on indictment in all the circumstances presenting offers a good and sufficient reason for allowing the extension of time sought. Additionally, the court considers that the circumstances which have led to the within application were outside the control of the Director of Public Prosecutions and/or could not reasonably have been anticipated by her. In terms of the balancing exercise referenced under rule 21(4), it seems to the court that what is required of it in this regard is that it balance (i) the public interest in prosecuting the offence on indictment, against (ii) (a) the right of the respondent to a fair trial and (b) such other effects as he contends to arise. The court considers (i) greatly to outweigh (ii) for the reasons that follow:

- in terms of timing, the alleged offence occurred (if it occurred) on 16th February, 2015. That is not a very long time ago and the court does not see that there are any ramifications as regards the fairness of the trial proceedings that would present in this regard. Indeed, in *O'Buachalla*, the Supreme Court directed remittal almost four years after the offence (not that such delay is an ideal to be aimed for);

- as to the ill-health that the respondent has suffered since the accident that is at the heart of the within proceedings, the medical evidence suggests that such ill-health is a result of the road traffic accident, rather than the existence of the criminal proceedings. Moreover, the court cannot but note that the respondent managed to bear up under the District Court trial and was even sufficiently well to face, at his election, into a Circuit Court appeal against conviction and sentence. Doubtless the respondent is apprehensive about any trial on indictment to come but such apprehension falls generally (if not always) to be expected of an accused facing into the ordeal (and it is an ordeal) of prosecution on indictment. If the court is wrong in its perception as to the state of the respondent's health, and respectfully it does not see on the evidence before it that it is, then any ill-health on the part of the respondent which is of such a degree that he simply cannot receive a fair trial is obviously a matter on which the trial judge can, must and will take such action at trial as seems appropriate to her/him in the course of trial. (See further in this regard *People (DPP) v. P. O'C* [2006] IESC 54).

17. In passing, the court notes that under O.84, r.21(5), RSC:

"An application for an extension referred to in sub-rule (3) shall be grounded upon an affidavit sworn by or on behalf of the applicants which shall set out the reasons for the applicant's failure to make the application for leave within the period prescribed by sub-rule (1) and shall verify any facts relied on in support of those reasons."

18. A complaint of the respondent in the within application is that the affidavit evidence sworn by the Director of Public Prosecutions recounts the fact of failure without giving reasons for that failure. The court respectfully does not see that this is so: the said affidavit evidence sets out in some detail the reasons for delay, e.g., (i) that it was not until October 2016 that it came to the attention of the directing officer that the District Court had purported to convict the respondent of the offence of dangerous driving causing serious harm, following 'not guilty' pleas, and (ii) the fact that there was a need for two opinions of counsel (itself necessary because the decision of the Supreme Court in *O'Buachalla* appears not to have been a decision that was widely reported or known). As to the contention that there is no line in the affidavit evidence whereby extra time is sought, despite a typographical error in the closing section of the affidavit evidence furnished by the Director of Public Prosecutions, it is clear from that affidavit evidence that the person who has sworn same seeks to pray of the court that it grant the relief being sought in the within proceedings, and the relief sought includes an order pursuant to O.84, r.21(3), RSC, extending the time for the bringing of the within application.

IV

Remittal

19. As to the power of the court to make a remittal under O.84, r.26(4), RSC, the court has been referred in this regard to *Sheehan v. Reilly* [1993] 2 IR 81, *Grennan v. Kirby* [1994] 2 ILRM 199, *Nevin v. Crowley* [2001] 1 IR 113, and, most helpfully, *Stephens v. Connellan* [2002] 4 IR 321. In *Stephens*, McKechnie J., at para. 37, identified the following applicable principles as regards the power of remittal, following a consideration of applicable case-law:

"(a) A person whose conviction by a court or tribunal having competent jurisdiction is subsequently set aside by way of certiorari on the grounds of some impropriety, has available to him the special plea of autrefois acquit as the quashing of such conviction, in law, amounts to an acquittal,

(b) A person, who has obtained an improper acquittal by a similar court or tribunal, will not have that acquittal set aside by the Superior Courts and accordingly will likewise have available a special plea, in that case one of autrefois acquit,

(c) Such a plea however is not available if the order pronouncing the conviction or acquittal was made by a court or tribunal acting in excess of or without jurisdiction with the result that even a subsequent order of certiorari will not act as a bar to a fresh prosecution of the same person on the same offence(s),

(d) The type of impropriety which would ground an order of certiorari where the court or tribunal has jurisdiction would be one 'referable to the conduct of the hearing... and not one referable to a matter vitiating the jurisdiction' of such court or tribunal; and finally,

(e) The rationale for the distinction appears to be that in the former situation an accused person is viewed by law as having been in peril in that he might have been subjected to lawful sanction, whereas in the latter instance, because of the absence of jurisdiction, the adjudication is said to be 'no adjudication at all' with the order and conviction being void ab initio and therefore being a nullity."

20. In the within proceedings, one is within the realm of category (c), as identified above: here the District Court never enjoyed a jurisdiction to try the respondent.

21. Having regard to the circumstances of the within proceedings, it seems to the court that it is appropriate not only to quash the respondent's conviction but to remit matters to the District Court for further trial. The party injured in the road traffic incident that is at the heart of the within proceedings suffered serious injury and the delay presenting does not, regrettably, differ from the ordinary

delays often encountered in prosecutions on indictment. As to the issue of the respondent's (ill-) health, the court reiterates what it has stated previously above concerning this aspect of matters. Finally, the court does not consider that the fact of the previous trial means that the respondent has 'shown his hand' as regards the case that he will likely run if there is now (and there will be) a trial on indictment. The respondent did not give evidence at his trial. He did, it is true, call the evidence of an engineer, but such evidence would have to be on notice to the prosecution (pursuant to s.34 of the Criminal Procedure Act 2010). And he has, of course, gotten to see the prosecution's 'hand' in terms of the case that it will bring and to test the prosecution's evidence in advance of the trial to come.

V

Conclusion

22. For the various reasons aforesaid, the court considers that (1) the District Court had no jurisdiction to try the respondent, (2) following *ÓBuachalla*, the appropriate order for the court to make is to quash the respondent's above-mentioned conviction and to remit the within proceedings for further trial.

Appendix

Note by Counsel of Ex Tempore Judgment of Supreme Court (Keane C.J., Murphy J., Murray J.) on 10th December, 1999 in DPP v. O'Buachalla and anor. Note approved by Keane C.J. on 31st October, 2000.

"Keane C.J. gave judgment saying:

This is an appeal from an order and judgment of the High Court of Mr Justice Quirke which concerned a prosecution in the District Court taken against the Second-Named Respondent.

The complaint against the Respondent was that he, at the time and place in question and in:

'...a public place, did drive a vehicle...in a manner (including speed) which having regard to all the circumstances of the case (including the condition of the vehicle, the nature, condition and use of such place and the amount of traffic which then actually was or might reasonably be expected then to be therein) was dangerous to the public whereby it caused serious bodily harm to another person, namely, Gillian Kingston contrary to s.53(1) (as amended by s.51 of the Road Traffic Act 1968) and (2)(a) (as amended by s.3 of the Road Traffic (Amendment) Act 1984) of the Road Traffic Act 1961...'

It is not in dispute that the Director of Public prosecutions was represented by a Garda Superintendent. The accused pleaded not guilty. It is apparent from the provisions of Section 13 of the Criminal Procedure Act, 1967, that once the accused had pleaded 'not guilty' the District Court was deprived of all jurisdiction to deal with the matter summarily. The District Court could have proceeded and dealt with the matter on a plea of guilty, and this would be in accordance with the provisions of Section 13.

The trial somewhat inexplicably proceeded as though it were a summary trial. The accused was convicted and a penalty was imposed.

The DPP then applied for leave to seek Judicial Review in the High Court seeking an order of certiorari and remittal.

Leave was granted and the opposition papers were filed.

The High Court in a reserved judgment dismissed the application. The High Court judge took the view that the District Judge had acted within jurisdiction because of an analysis he carried out of the various statutory provisions.

The accused had appealed his conviction and the appeal is pending.

It is to be said immediately that Mr de Blacam has quite properly conceded that the District Judge had no jurisdiction to try the indictable charge unless certain things had happened.

The proposition now advanced (which was not in the opposition papers or in the written submissions) is that what occurred was the responsibility of the prosecution. Mr de Blacam's client was tried and convicted and it would be unjust to the accused to face another prosecution in circumstances where the DPP or his agent was responsible.

It is said the DPP is estopped.

Certain case-law has been relied on. The first of these is R. v. Kerry County Council [1901] IR 3215. This was a decision of the Court of Appeal. I am satisfied this case involved civil proceedings. The case had no bearing on a criminal trial.

The District Court manifestly acted without jurisdiction. If the matter is allowed to rest the Circuit Court would hear an appeal, but it would have no jurisdiction to do so.

The circumstances here are different to The State (Byrne) v. Frawley [1978] IR 326. No question of jurisdiction arose in that case or certiorari. The whole question here is one of jurisdiction. The District Court had no jurisdiction.

No question of estoppel arises. If the reverse situation arose and the Respondent was seeking an order, the Court would grant it.

The Court cannot allow the order to remain on the record.

The Appeal will be allowed and the order quashed and there will be an Order of Remittal to the District Court.

There must be a trial now to enable the prosecution to be dealt with.

Murphy and Murray JJ. concurred.

Mark de Blacam, SC Adrienne Egan, BL”

Approved: RK

31/10/00.