Neutral Citation: [2016] IEHC 266

THE HIGH COURT

Record No. 2015/241JR

BETWEEN/

EDWARD HANRAHAN

APPLICANT

–and –

DISTRICT JUDGE MARY FAHY &

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr Justice Max Barrett delivered on 26th May, 2016.

Part 1

Introduction

1. Had Mr Hanrahan not scarpered when he did, all this would now be long behind him. On 21st December, 2009, he went before the District Court in Galway charged with three alleged burglaries. The prosecuting Garda inspector appears to have indicated to the District Judge that the DPP had directed that the matter be dealt with summarily. Certainly the District Judge accepted jurisdiction and Mr Hanrahan's next appearance at the District Court was scheduled for 15th March, 2010.[1]

> *[1] By way of background to the events of the 21st, the following extract from Professor Walsh's learned text, Walsh on Criminal Procedure, (2002), 665-6, is of assistance:*
>
> *"Mode of trial is likely to be an issue when the accused appears before the District Court charged with an indictable offence. Where the offence charged is one which the court has jurisdiction to try summarily the judge must inform the defendant of his right to be tried by a jury. If the accused stands on his right to be tried by a jury the judge will remand him in custody or on bail to a future sitting of the court. This is likely to be followed by a whole series of remands until the accused is sent forward for trial….However, if the judge is satisfied that the person does not object to being tried summarily, and that the DPP does not object to summary trial he or she can proceed to try the case immediately or put it back for consideration at a later sitting of the court. Before the judge can take this decision he or she must hear the facts alleged in support of the charge and form the opinion that they constitute a minor offence fit to be tried summarily."*

2. The hearings of 15th March, 2010, came and went without sight or sound of Mr Hanrahan in court. From that date onwards, he seems to have led an elusive existence. It is believed that he went first to England. However, he was back in Ireland from time to time. He was sighted by a Garda in Cork in June 2011. But on being hailed by the Garda, he jumped from his bike and ran away. In June 2012, he is believed to have been in a car accident in Louth. But by the time the Gardaí arrived he had quit the scene. In November 2014, his luck finally ran out. On the 29th of that month, he was spotted in a Donegal village and tried to skip across the Border, but was captured by a fleet-footed garda.

3. By the time of this eventual arrest, Mr Hanrahan appears to have been living in Newry with his partner and their two (now three) children. Though he initially gave the Gardaí a false name, he was soon discovered in his lie and brought again before the District Court in Galway. This time, two of the three burglary charges that he originally faced were struck out. But the third charge remained. And this time, the prosecuting Garda indicated that the DPP had directed that Mr Hanrahan be tried on indictment. This has the result that Mr Hanrahan will be tried in the Circuit Court; and, if the charge against him is proven, he will be exposed to the rigorous sentencing powers available to that Court.

4. Mr Hanrahan considers the DPP's decision that he ought to be tried on indictment is unfair, makes no sense, and is in breach of his rights to fairness and fair procedures. 'How could it be', he asks in effect, 'that when faced with three charges I was fit to be tried summarily, but faced with one, trial on indictment is now deemed fitting?' Mr Hanrahan comes to this Court asking for an array of orders that would in effect see his progress to trial in the Circuit Court halted, and a belated trial in the District Court take place in its stead.

5. Specifically, Mr Hanrahan seeks: (i) an order of *certiorari* quashing his return for trial in the Circuit Court on the sole surviving charge against him;(ii) an order of *certiorari* quashing and expunging the record of the direction and/or consent for trial on indictment latterly communicated to the District Judge; (iii) an order of prohibition prohibiting the prosecution of Mr Hanrahan pending before the Circuit Court; and (iv) a declaration that any change of mind by the DPP as regards the mode or locus of Mr Hanrahan's trial flies in the face of common-sense and was unreasonable or unlawful in circumstances where, by Mr Hanrahan's account, two charges were withdrawn and where no reason for the change was indicated and/or communicated, all to Mr Hanrahan's prejudice.

Part 2

A Mistake

6. What explanation does the DPP offer for (a) being initially satisfied for Mr Hanrahan to be tried summarily on three counts of burglary, and (b) now considering that Mr Hanrahan ought to be tried on indictment for the sole surviving burglary charge that remains? It turns out that nothing falls to be explained in this regard as there has been no change of position on the part of the DPP.

According to the statement of opposition:

> *"It is accepted that [Mr Hanrahan]…is charged with an offence of burglary which was allegedly committed on the 25th September, 2009. Insofar as it is pleaded that the District Court Judge was informed in December 2009 that the offence was to be tried summarily, that information appears to have been provided in error. It was always the intention of the [DPP]…to try the offence in question on indictment and [the]…only direction that issued in this case was that the case proceed on indictment.*
>
> *[Back in November 2009, a] file was prepared for the office of the [DPP]….along with a file for the prosecution of [Mr Hanrahan's]…co-accused. Directions issued in relation to the co-accused in April 2010 and in relation to the applicant in July 2010. The [DPP's]…direction was that only the count which is the subject-matter of these proceedings [the sole-remaining burglary charge] should proceed and that the other charges should not be prosecuted due to lack of evidence. It appears that incorrect information was given to the Court in December 2009 and that this is regretted. That information appears to have been given in error and that error only became apparent to the [DPP]…in [or] after the arrest of [Mr Hanrahan]…in November, 2014.*
>
> *The respondent did not consent to summary disposal which is a prerequisite for summary trial of such offences. Absent a direction from the respondent that the applicant not be sent forward to trial, there is no jurisdiction to try the applicant summarily."*

7. The court does not doubt that the error identified in the above-quoted statement of opposition occurred as stated. That has the result that the DPP has acted consistently from the outset. Her office initially directed, and has always directed, that Mr Hanrahan be tried on indictment. So there is no irrationality or unreasonableness; instead there is rationality and consistency. If it was communicated to the District Judge by the Garda inspector back in 2009, and this does appear to have occurred, that Mr Hanrahan should be tried summarily, then that was a mistake. The question that arises is should that mistake now bind the DPP?

Part 3

Guidelines for Prosecutors

8. Counsel for Mr Hanrahan contends that the DPP is bound by the actions of the Garda inspector back in November 2009. He points in this regard to the "*Guidelines for Prosecutors"* published by the DPP, especially Chapter 13 ("*Summary Trial"),* noting how the Gardaí in many instances act for the DPP and thus must, he maintains, be capable of binding the DPP. The difficulty that arises for counsel in this regard is that the Guidelines are not law and are not issued pursuant to any statutory duty or power. This is recognised in the Guidelines which state as follows in Chapter 1 ("*Introduction"),* at 6:

> *"1.4 The Guidelines are not intended to and do not lay down any rule of law. Rules of law are made by the Oireachtas and the courts. To the extent that there are existing rules of law which govern prosecution policy, the Guidelines are intended to reflect those rules. The Guidelines are not issued pursuant to any statutory power."*

9. The long and short of the foregoing is that when it comes to resolving the issues raised in the present application, the focus of attention needs to be on the rules of law which the Guidelines seek to reflect, specifically case-law, and not so much in the *Guidelines for Prosecutors.*

Part 4

Applicable Case-Law

A. Overview.

10. As ever, counsel have carefully mined the law reports and identified a rich seam of applicable case-law that includes *Kelly v. DPP* [1996] 2 I.R. 596, *Devanney v. Shields*[1998] 1 I.R. 230, *Eviston v. DPP* [2002] 3 I.R. 260,Carlin v. DPP [2010] 3 I.R. 547, and *Gormley v. Smith* [2010] 1 I.R. 315. The court turns to consider these cases.

B. Kelly and Gormley.

11. In *Kelly*, various summary charges were instituted out of time against Mr Kelly. Subsequently he was arrested and charged with an indictable offence arising from the same facts. The summary charges were then withdrawn. When the indictable offence came on for trial in the Circuit Court, counsel for Mr Kelly contended that it should not proceed because the trial on indictment had been contrived to circumvent the issue presenting regarding the summary offences. An order of prohibition was sought and refused in the High Court; an appeal from this decision to the Supreme Court failed, the Supreme Court holding that where a matter may proceed summarily or on indictment, the DPP may elect for either procedure up to the moment of acquittal or conviction, provided that an accused's right to a fair trial is not thereby abused.

12. In the Supreme Court, Murphy J., at 604, quoted with approval the observation of the High Court judge (O'Hanlon J.) to the effect that:

> *"The State is in a position up until the applicant was acquitted or convicted to reconsider its decision and to fall back on the indictable charge if it saw fit to do so",*

then added:

> *"It is, however, the clear law that no power of the Director can be exercised in such a way as to constitute an abuse of the right of the defendant to a fair trial."*

13. Murphy J.'s observations were later referred to with approval by Geoghegan J. in *Gormley v. Smyth* [2010] 1 I.R. 315, at 329, as holding true even on the very different facts of that case. (In Gormley, the District Judge had accepted jurisdiction to try a so-called 'hybrid' offence summarily after being told in error by a member of An Garda Síochána, that the DPP was satisfied for matters to proceed summarily. Subsequently, a solicitor for the DPP indicated that the DPP was directing a trial on indictment. Mr Gormley opposed this direction on the ground that the District Judge had already accepted jurisdiction. However, the District Judge ordered that the applicant be sent forward for trial on indictment. An application to quash that order failed in High Court; a later appeal to the Supreme Court was likewise unsuccessful).

14. If the DPP can lawfully elect for an alternative mode of trial right to the moment of acquittal/conviction, provided the right to fair trial is not thereby abused, then it makes absolutely no sense as a proposition that where a Garda inspector, through human error, indicates that one mode of trial is considered as appropriate by the DPP (when in fact she considers another to be appropriate) she is always and evermore to be caught by that indication. Provided there is no abuse of process arising (and in the present case there is none), what possible logical basis could there be for the proposition that the DPP enjoys Kelly-esque latitude even in cases where error presents, except where the error is that a member of An Garda Síochána mis-spoke? There is no logical basis presenting. It is a proposition that flies in the face of the latitude of action that *Kelly*, and indeed *Gormley*, clearly indicate the DPP to enjoy.

C. Devanney.

15. *Devanney* was a case that centred upon the validity of the appointment of a District Court clerk. Under the Court Officers Act, 1926, a District Court clerk fell to be appointed personally by the Minister for Justice. When the appointment of a particular District Court Clerk arose as an issue in Devanney, the respondents relied upon the principle identified by Greene M.R. in *Carltona Ltd. v. Commissioners of Public Works* [1943] 2 All E.R. 560, 563 as support for the proposition that the functions given to ministers are so multifarious, i.e. many and of various types, that no one minister could discharge them; it suffices that the powers normally be exercised under the power of a minister, with the minister remaining accountable to the legislature.

16. Greene M.R.'s observations in Carltona, at 563, are worth quoting at some length:

> *"In the administration of justice in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them….The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them."*

17. In the Supreme Court, Hamilton C.J., at 254, borrowing from the wording of the judgment of Donaldson M.R. in *R. v. Home Secretary*, ex parte *Oladehinde* [1991] A.C. 254, 282, indicated that (as in England and Wales) *"[T]he principle outlined in Carltona is a common law constitutional power, but one which is capable of being negatived or confined by express statutory provision."*

18. Counsel for Mr Hanrahan maintains that the *Carltona* principle has the effect that the indication by the Garda at the District Court in December 2009 that the DPP had directed that the matter be dealt with summarily, even though the Garda was in error and the DPP had in fact directed that matters proceed on indictment, binds the DPP at law and that, harking back to Eviston, the DPP cannot now take a contrary decision on the same facts.

19. The court, with every respect, does not accept this last-mentioned proposition. *Carltona* is authority for the proposition that a civil servant may take a legally binding decision that is vested in a minister, with the minister thereafter being accountable to Parliament for errors or follies arising. *Carltona* is not authority for the proposition that after a minister (or, by analogy, the DPP) has taken a decision, that a person speaking on her behalf (here the Garda inspector) can take a contrary decision of his own to do, or through error do, something that will necessarily bind that minister (or, by analogy, the DPP).

20. Doubtless there could be instances arising where the action of such an agent could not lightly be overcome, e.g., where there was some unfairness arising, or unfair procedure presenting. But here there was no unfairness arising, no unfair procedure presenting. Here there was a simple human error by the Garda inspector, and none by the DPP. It is possible that had Mr Hanrahan not fled when he did, the Garda inspector's mistake would never have been discovered and Mr Hanrahan would have been tried summarily. However, one will look long and hard in the law reports to find a case which supports the proposition that where a person skips a summary trial that he was not supposed to face and returns, after capture, to face the trial on indictment that he was always intended to face, he should be allowed to benefit from a mistake that might have seen him tried summarily had he not previously skipped the jurisdiction.

21. There is no unfairness or unfairness of procedures in what has occurred in Mr Hanrahan's case, just a possible missed opportunity whereby he might have escaped the trial by indictment that he now faces, and which the DPP always directed that he should face, had he stayed around for his trial in 2010 and not skipped the country. Mr Hanrahan alone is responsible for the fact that he scarpered when he did and, in doing so, lost out on a possible opportunity that he was never intended to enjoy.

D. Eviston and Carlin.

22. In *Eviston*, the DPP did a 'U-turn' in terms of deciding whether or not to prosecute. Ms Eviston had been involved in a road accident in which an innocent third party was killed. The DPP decided that no prosecution should be initiated and this decision was communicated to Ms Eviston's solicitor.

23. After this decision, the father of the deceased third-party wrote a letter to the DPP asking the DPP to reconsider his initial decision. The DPP then reviewed his decision and decided to charge Ms Eviston with certain road traffic offences. Having been refused an explanation by the DPP for this change of tack, Ms Eviston sought an order prohibiting her prosecution.

24. Prohibition was granted by the High Court and this decision was affirmed, on appeal,by the Supreme Court.In the Supreme Court, the judgment of Keane C.J. is of especial interest. The essence of that judgment was later neatly summarised by Fennelly J. in his judgment in Carlin, at 555:

"[I]t is appropriate[wrote Fennelly J.] to recall the nature and extent of the powers of the [DPP]…to decide, respectively, to institute a prosecution, to decide not to prosecute and to review and, where appropriate reverse any earlier decision. The relevant case law has seen the development of clear criteria. Keane C.J., most notably, in his majority judgment in Eviston…comprehensively examined and explained the key elements. For the purposes of the present appeal it is sufficient to recall the essence of that judgment. Firstly, 'both the decision to initiate a prosecution and the subsequent conduct of the prosecution are functions exclusively assigned…to the [DPP]…under the Constitution and the relevant statutory provisions' (p.290). Secondly, in the absence of mala fide, evidence that the [DPP]…had abdicated his functions or improper motivation, the [DPP]…'cannot be called upon to explain his decision or to give the reasons for it or the sources of the information upon which it is based' (p.294). Thirdly, the [DPP]…is entitled to review and to reverse his own earlier decision not to prosecute even in the absence of new evidence and even following the making of representations by the complainant or his family….

On the other hand, the [DPP]…'…remains subject to the Constitution and the law in the exercise of his functions…' (p.290). He is 'not exempt in the performance of his statutory functions from the general constitutional requirements of fairness and fair procedures…'(p.295).

….Keane C.J. referred specifically to the relationship between the decision to reverse a decision not to prosecute and the need to respect fair procedures in the following passage at p.295:-

'It also seems to me…that where, as here, the [DPP]…avails of his undoubted right not to give any reasons for a decision by him to reverse a previous decision not to prosecute, but concedes that there has been no change of circumstances, his decision is, as a matter of law, prima facie reviewable on the ground that there has been a breach of fair procedures. Whether such a breach has been established must, of course, depend entirely on the circumstances of the particular case."

25. The court has been referred to the application of, *inter alia, Eviston,* in *DPP (Conlon) v. Cash* (Unreported, High Court, Ó'CaoimhJ., 7th March, 2003). However, of greater interest in the context of the facts presenting is the consideration and application of *Eviston* by the Supreme Court in its later decision in *Carlin*. The facts of *Carlin*, though ostensibly very similar to those in the earlier case of *Eviston*, were, surprisingly perhaps, to prove the basis on which the Supreme Court in Carlin identified a critical distinction between the two cases that enabled it to arrive at a contrary conclusion to that reached in *Eviston*, despite applying the same legal principles. In *Carlin*, the DPP had initially taken the decision not to prosecute Mr Carlin on a charge of assault causing harm. He later reviewed that decision, following representations from the injured party's family, and decided that a prosecution should in fact ensue.

26. In his judgment in *Carlin*, at 559, Fennelly J. identifies the critical difference between the two cases as being that Ms Eviston had suffered exacerbated anxiety and stress as a result of the DPP's decision whereas Mr Carlin seemed not to go beyond alleging a degree of annoyance and inconvenience. Fennelly J. accepted, at 558, that Kearns J. had made no reference at all in his High Court judgment to the suffering of stress or anxiety by Ms Eviston. He accepted too, again at 558, that McGuinness J., in *Eviston*, had seemed to rest her judgment, at least in part, on the fact that the initial decision not to prosecute had been communicated unequivocally and without caveat, thus providing no 'wriggle-room' to the DPP for a retreat from the decision not to prosecute. But anxiety and stress-levels were identified by Fennelly J. as the critical distinction, though – presumably eager to avoid an influx of stressed-out accused persons into the superior courts – Fennelly J. was careful to note, at 559, that Mr Carlin, and any accused similarly placed *"would have to have shown that the level of anxiety or stress suffered was raised beyond that normal level by reason of the failure of the respondent to observe fair procedures."*

27. What are the key lessons to be taken from the above consideration of *Eviston* and *Carlin*. It seems to the court that they are six-fold:

(1) The decision to initiate a prosecution and the subsequent conduct of that prosecution are functions exclusively assigned to the DPP under the Constitution and statute.

(2) Absent bad faith and/or evidence that the DPP has abdicated her functions and/or improper motivation, the DPP cannot be called upon (a) to explain her decision,or (b) to give (i) the reasons for it or (ii) the sources of the information upon which it is based.

(3) The DPP is entitled to review and to reverse her own earlier decision not to prosecute (a) even absent new evidence and/or (b) following the making of representations by the complainant or his family.

(4) The DPP remains subject to the Constitution and the law in the exercise of her functions. She is not exempt in the performance of her statutory functions from the general constitutional requirements of fairness and fair procedures.

(5) Where the DPP avails of her right not to give any reasons for a decision by her to reverse a previous decision not to prosecute, but concedes that there has been no change of circumstances, her decision is, as a matter of law, *prima facie* reviewable on grounds of breach of fair procedures.

(6) Whether such a breach has been established depends entirely on the circumstances of the particular case.

28. It follows from *Eviston* and *Carlin* that, provided there is no breach of fairness and fair procedures, the DPP can properly review and reverse a communicated and un-caveated decision not to prosecute, even where there has been no change of facts. It seems barely a leap from that logic that, provided there is no breach of fairness and fair procedures, the DPP can properly adhere to a non-communicated decision to prosecute on indictment, even when there has been no change of facts.

29. The only possible unfairness presenting in this case is that Mr Hanrahan was, thanks it seems to a mistake by a Garda inspector at the District Court in December 2009, led mistakenly to understand that one state of facts pertained (that he would be prosecuted summarily)before later learning that another had always pertained (that he would be prosecuted on indictment). But that seems no more unfair than Ms Eviston or Mr Carlin being led to believe that one state of facts pertained (that they would not be prosecuted) and later being advised that another pertained (that they would be prosecuted). It might even be contended that Mr Hanrahan comes out of matters slightly better than Ms Eviston or Ms Carlin when it comes to sentencing risk. They, as a result of the DPP's eventual decision to prosecute, went from no sentencing risk to some sentencing risk. Mr Hanrahan (at least on the facts as initially known to him, though not when one has regard to the constancy of the DPP's decision) has gone from limited sentencing risk to higher sentencing risk, though again this is a matter of perception only (the DPP's decision goes unchanged) and any mitigating factors that he considers to present (such as his having been a teenager at the time of the offence and his having become a responsible family man since then)have equal mitigating effect in any court.

30. Finally, there is no suggestion that Mr Hanrahan is suffering or has suffered from the fearful angst that appears to have afflicted Ms Eviston. Indeed, Mr Hanrahan's years on the run, his forays back and forth across the Border, and his several 'near escapes' while on this side of the Border, all suggest him to be a man of no little resilience.

E. Conclusion

31. For the reasons stated above, the court is coerced by law into declining the various reliefs sought by Mr Hanrahan at this time.