



THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 67

Appeal No. 2014/70

[Article 64 transfer]

**Kelly J
Peart J.
Mahon J.
BETWEEN**

JAMES O'MALLEY

FIRST RESPONDENT

- AND -

DISTRICT JUDGE PAUL KELLY

SECOND RESPONDENT

- AND -

THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY/APPELLANT

Judgment of Mr. Justice Mahon delivered on 27th March 2015

The District Court proceedings

1. On 15th September 2014 the first Respondent was convicted of thirty three offences at Letterkenny District Court. Thirty of the convictions related to offences committed in Co. Donegal, two related to offences committed in Dublin, and one to an offence committed in Newbridge, Co. Kildare. When the matter came before the second Respondent sitting at Letterkenny District Court, the first Respondent pleaded guilty to all charges and received a number of custodial sentences ranging from five days to six months imprisonment and which included various concurrent sentences. A number of other offences were taken into consideration.

2. The three offences which were not committed in Dublin ("the non Donegal offences") were:-

(i) A charge that the first Respondent on 20th April 2013 at Oldborough Court, North Strand Road, Dublin 1, in the Court area of the Dublin Metropolitan District, assaulted one Kamil Hallel causing him harm contrary to Section 3 of the Non Fatal Offences against the Person Act 1997. The charge was recorded on Fitzgibbon Street Charge Sheet no. 13702449.

(ii) A charge that on the 24th May 2014 at Museum Luas Stop, Dublin 7, a public place in the Dublin Metropolitan District, the first Respondent engaged in threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace, or being reckless as to whether a breach of the peace might have been occasioned, contrary to Section 6 of the Criminal Justice (Public Order) Act 1994, as amended by Section 22 of the Intoxicating Liquor Act 2008. The charge was recorded on Bridewell Charge Sheet no. 13800904.

(iii) A charge that on 20th December 2013 at Edgeworth Street, Newbridge in Co. Kildare within the District Court area of Naas, the first Respondent provided Garda Wendy Doyle with a name and address which was false and misleading, contrary to Section 24(3) and (4) of the Criminal Justice (Public Order) Act, 1994, as amended by Section 22 of the Intoxicating Liquor Act 2008. The offence was recorded on Charge Sheet no. 14370326.

3. In relation to the two Dublin offences, the first Respondent was brought before the Dublin Metropolitan District Court (Court 2, in the Criminal Courts of Justice, and Court 44, in the Bridewell Courts, Dublin 7, respectively). In respect of both, he was remanded on bail. In respect of both charges the first Respondent was remanded to District Courts within the Dublin District Court area, but ultimately failed to appear in the District Court as directed, and was the subject of arrest warrants. In relation to the Newbridge charge, the first Respondent was initially prosecuted before the Dublin Metropolitan District Court, having been arrested in Dublin, and was remanded on bail to appear on 27th December 2013, whereupon he was remanded in custody with consent to bail to appear again on 24th January 2014. He failed to appear on this date and was the subject of an arrest warrant. At the time of the commission of these non Donegal offences, and on the occasion of his appearances in the District Court in Dublin, the first Respondent was resident in Dublin.

4. On 10th April 2014 the first Respondent was arrested on foot of a warrant issued by the Dublin District Court on 24th January 2014 (relating to the Fitzgibbon Street Charge Sheet no. 10702449) in Co. Donegal and was brought before Buncrana District Court. He was there granted bail and remanded to appear again before Letterkenny District Court on 4th April 2014. It was a condition of his bail that he would continue to reside at an address which was provided by the Appellant, 137 Donegal Road, Ballybofey, Co. Donegal. He was further remanded on bail to Letterkenny District Court on 9th June 2014, and remanded again to 12th September 2014 to Letterkenny District Court. On that occasion he failed to appear and an arrest warrant was issued. He was arrested in Letterkenny on 15th September 2014 in relation to another Donegal offence, and the outstanding arrest warrant was executed whereupon he was brought before Letterkenny District Court.

5. On 15th September 2014 at Letterkenny District Court the first Respondent pleaded guilty to thirty three charges, including the three non Donegal charges, before the second Respondent. On that occasion his solicitor advised the Court that the first Respondent was then residing at 16 Sesigh View, Donegal Road, Ballybofey, Co. Donegal. He was assigned legal aid.

6. On 15th September 2014 at Letterkenny District Court, the first Respondent's solicitor advised the Court that his client had signed an authority to consent to the disposal of all thirty three charges at Letterkenny District Court, and that the first Respondent was

now residing in Co. Donegal. The second Respondent was informed that the first Respondent did not wish to return to Dublin to deal with the three non Donegal charges as his life was under threat from a Dublin based criminal in relation to a drug debt. While it was suggested by the prosecuting Garda Inspector that the Court should deal only with the Donegal charges, and that the non Donegal charges would be remanded back to the District Court in Dublin, there was, effectively, no objection to all the charges, including the non Donegal charges being dealt with at Letterkenny District Court. The Notice Party, (the DPP), requested that all charges be dealt with summarily by the second Respondent. The second Respondent accepted jurisdiction and dealt with the thirty three charges, including the three non Donegal charges. Pleas of guilty were entered on behalf of the first Respondent. The three non Donegal convictions resulted in the imposition of prison sentences of six months, one month and one month respectively, all to run concurrently.

7. It is accepted that at the time of the commission of the three non Donegal offences, the first Respondent was resident in Dublin, and that he later became resident in Donegal and claimed to be a resident in Donegal at the time of the 33 cases being dealt with by the second Respondent.

The High Court proceedings

8. On 24th September 2014 the High Court granted leave to the first Respondent to apply for Orders of Certiorari by way of application for judicial review. On 7th November 2014, those judicial review proceedings came on for hearing before McDermott J., whereupon the following orders were made:

(i) An Order of Certiorari of the Order of the second Respondent made in Letterkenny District Court on 15th September 2014, convicting the first Respondent and imposing a sentence of six months imprisonment on foot of Charge Sheet 13702449, being an offence of assault causing harm contrary to s. 3 of the Non Fatal Offences against the Person Act 1997.

(ii) An Order of Certiorari quashing the warrant of execution drawn up in respect of the sentence imposed by the second Respondent on Charge Sheet 13702449.

(iii) An Order of Certiorari of the Order of the second Respondent made in Letterkenny District Court on 15th September 2014, convicting the first Respondent and imposing a sentence of one month imprisonment on foot of Charge Sheet 13800904, being a statutory breach of the peace contrary to s. 6 of the Criminal Justice (Public Order) Act 1994 (as amended by s. 22 of the Intoxicating Liquor Act 2008).

(iv) An Order of Certiorari quashing the warrant of execution drawn up in respect of the sentence imposed by the second Respondent on Charge Sheet 13800904.

(v) An Order of Certiorari of the Order of the second Respondent made in Letterkenny District Court on 15th September 2014, convicting the first Respondent and imposing a sentence of one month imprisonment on foot of Charge Sheet 14370326, namely providing a false name and address contrary to s. 24 of the Criminal Justice (Public Order) Act 1994 (as amended by s. 22 of the Intoxicating Liquor Act 2008).

(vi) An Order of Certiorari quashing the warrant of execution drawn up in respect of the sentence imposed by the second Respondent on Charge Sheet 114370326 para 7. In lieu of directing that Orders of Certiorari issue it was ordered that the aforesaid convictions and sentences and all records and entries relating thereto be quashed without further order. It was also ordered that the matters be remitted to the Dublin District Court to be determined in accordance with law.

9. On 14th November 2014 the High Court directed the second Respondent to pay to the first Respondent two thirds of the cost of the proceedings in that court, to include reserved costs when taxed and ascertained.

10. Following upon the Order of the High Court, the first Respondent was released from prison.

11. In his judgement, the High Court Judge found there was no statutory provision enabling criminal charges to be transferred from one District to another for hearing and determination.

12. The trial judge found that the Dublin Metropolitan District Court was vested with jurisdiction to hear and determine the three non Donegal charges. He noted that the complaints relied upon to initiate the prosecutions were made in Dublin before a District Judge, who was authorised to receive them in accordance with the jurisdictional criteria laid down for that purpose, as noted by Kingsmill Moore J. in *Attorney General (McDonnell) v. Higgins* [1964] IR374 at 390.

13. The High Court Judge expressed his view that the Dublin Court was vested with full jurisdiction to hear and determine the three non Donegal charges because they were properly initiated following the making of complaints set out in charge sheets and laid before it. He found that the warrant that subsequently issued was simply to compel the attendance of the accused for the trial of these charges and thereby enable the Court to exercise its jurisdiction *to hear and determine* the charges. That court was a District Court within the Dublin Metropolitan District Court area. He expressed his view that the requirement under s. 79 of the Courts of Justice Act 1924 (as amended) that the criminal jurisdiction of the District Court shall be exercised by a Judge for the time being assigned to the District where the crime has been committed or the accused has been arrested or resides, may only be exercised upon the initiation of the complaint. The complaint must be brought in the appropriate District Court area, and the matter should then be heard and determined in the District Court in which the complaint is made.

The appeal

14. The Director of Public Prosecutions has appealed the Orders of the High Court dated 7th November and 14th November 2014. Her grounds of appeal are:-

(i) *The Trial Judge erred in law in holding that the Donegal District Court had no jurisdiction to convict the Respondent. In circumstances where the Respondent was resident in Donegal at the date of his conviction, the District Judge was not precluded by terms of s. 79 of the Courts of Justice Act 1924 (as amended) or otherwise from dealing with the matter.*

(ii) *Having found that the Respondent had no merits, had acquiesced in the Donegal District Court dealing with the matter, and in circumstances where the judicial review papers did not disclose the Respondent's residence in Donegal and the fact that he had been granted bail to a Donegal address, the Trial Judge erred in law and, in fact, in failing to exercise his discretion and to hold that the Respondent's acquiescence and/or lack of candour, or both, disentitled the Respondent to the relief sought.*

The law governing District Court prosecutions

15. Section 79 of the Courts of Justice Act 1924, as amended by S. 41 of the Courts and Court Officers Act 1995, S. 5 of the Criminal Justice (Miscellaneous Provisions) Act 1997, and S. 22 of the Criminal Justice Act 1999 provides for the criminal jurisdiction of a District Judge in the following terms:-

"In criminal cases, by the justice for the time being assigned to the District wherein the crimes has been committed, or the accused has been arrested, or resides."

16. Order 13 rule 1 of the District Court Rules 1997, as substituted by rule 3 of the District Court (Criminal Justice Act 2007) rules 2008 provides for the following:

"Criminal proceedings shall be brought, heard and determined either:-

(a) in the Court area wherein the offence charged, or, if more than one offence is stated to have been committed within a Judge's District, any one of such offences is stated to have been committed; or

(b) in the Court area wherein the Accused has been arrested, or

(c) in the Court area wherein the Accused resides, or

(d) in the Court area specified by Order made pursuant to the provision of s. 15 of the Courts Act 1971."

17. Section 5 of the Criminal Justice (Miscellaneous Provisions) Act 1996, states as follows:

(i) Notwithstanding Section 27(3) of the Courts of Justice Act 1953, the court before which a person first appears charged with a particular offence, or a judge of the District Court exercising jurisdiction under ... may remand that person in custody to appear at a sitting of the District Court ("alternative") in the District Court District in which the person or place of detention where he or she is to be held in custody is situated or a District Court District adjoining the first mentioned District Court District.

(ii) The alternative court may, from time to time, as occasion requires, further remand a person, referred to in sub section (1) of the said section 79, in custody or on bail, to that court or to another alternative court.

(iii) An alternative court shall, for the purposes of the conduct of a preliminary examination under the Act of 1967 in relation to a person, or as the case may be, the trial of a person, remand the person to a sitting of the court in the District Court District:

(3) in which the offence to wit the preliminary examination or trial relates was committed, or

(4) in which the person resides or was arrested.

(iv) The said section 79 is hereby amended by the substitution of the following sub section for sub section (3):

(3) a judge of the District Court exercising jurisdiction under sub section (2) shall not have jurisdiction to:

(a) conduct a preliminary examination...or

(b) try an accused for an offence unless that jurisdiction is exercised in the District Court District

(i) in which the offence was committed, or

(ii) in which the accused resides or was arrested.

(v) Sub section (4) of the said Section 79 shall not apply to an alternative court.

18. It was correctly stated by the trial judge in the course of his judgment that *"there is no statutory provision which confers a power upon a judge of the District Court to adjourn a case initiated in one District to another District Court District for disposal."* There is, however, a specific provision enabling a district judge to hear and determine proceedings in respect of summary offences in any court within that judge's District.

19. Ordinarily, there is no power to transfer the trial of a summary offence in the District Court between the District Court in which the relevant charge was properly laid to another District Court. The position is not altered because an accused person has moved his or her normal place of residence to the latter District Court district after the charges have been properly brought in the former District Court district.

20. Provision does exist to enable a District Judge sitting elsewhere to the district where the accused has his place of residence or the place in which the crime was committed or where an accused had been arrested, to transfer it to the district in which the judge is sitting. That issue was considered in *Shane Coates v. Judge Aidan O'Donnell* and DPP [1996] 11.R.417. In his judgment (at 421) Geoghegan J. stated the following:

"The true meaning of sub section (4) becomes clear in my view when one regards it as part of a new code or regime provided for by the amendments to Section 79 of the Act of 1924. If on a particular day, there is no District Judge available for some reason, in an appropriate district where it is intended to charge an accused, a judge in some other district can deal with the matter, but sub section (4) enables that judge to send it to the judge of the district in which the case would have been commenced had such judge been available. The objection of counsel for the respondents based on the use of the words "in respect of such district" seems to me to be no answer. Exercising jurisdiction in

respect of another district is not the same thing as exercising jurisdiction in the other district."

21. In *Massood v. Judge Cormac Dunne and DPP* [2006] 31.R. 79, McMenamin J. found that jurisdiction was capable of being held simultaneously by the judges of the District Court, both in the District Court where the accused person resided and the District Court where the offence was allegedly committed. It was also stated, *obiter dicta* that

"where information was sworn and a warrant was issued in one District and the accused was brought before a judge in a different District who did not have jurisdiction based upon the place of residence of the accused, the place where the accused was arrested or where the alleged crimes had been committed, then that judge was limited to transferring the case back to the appropriate district."

22. In respect of the non Donegal offences, the accused was properly before the District Court in the Dublin Metropolitan District. The matters had not been transferred by a judge in the District Court in the Dublin Metropolitan District to the District Court in Co. Donegal, nor in the circumstances could such transfer have validly taken place. There was no lawful basis, therefore, in which the second Respondent could process those cases in Co. Donegal, irrespective of the fact that the accused consented to them being dealt with by him. The second Respondent did have the power however, to transfer the cases back to the Dublin Metropolitan District.

Acquiescence

23. It is contended on behalf of the DPP that the first Respondent acquiesced in his cases being dealt with by the second Respondent at Letterkenny District Court on 15th September 2014 and that the discretionary relief he sought, and obtained from the High Court, should be denied to him for the following reasons.

24. The first Respondent himself played a pivotal role in the circumstances which resulted in the three non Donegal cases being concluded in Letterkenny District Court, and which resulted in his conviction and imprisonment for those offences. The first Respondent instructed his solicitor to advise the court in Letterkenny that he was resident in Donegal and on that basis the cases should be dealt with in that venue. Indeed, he actively sought to persuade the second Respondent that he objected to the cases being returned to Dublin as he did not wish to return to Dublin because he was fearful that if he did so his life would be in danger from a criminal gang. He very consciously submitted to the jurisdiction of the Respondent. In the words of the trial judge, the Respondent's *"story changed to suit his interests"*. In *Lynch v. District Judge David Anderson and the DPP* [2010] 7JIC0905, Kearns P. cited with approval the remarks of O'Higgins C.J. in *The State (Abenglen) v. Corporation of Dublin* [1984] IR381:

"In the vast majority of cases, however, a person whose legal rights have been infringed may be awarded certiorari ex debito justitiae if he can establish any of the recognised grounds for quashing; but the court retains a discretion to refuse his application if his conduct has been such as to disentitle him to relief or, I may add, if the relief is not necessary for the protection of those rights. For the courts to act otherwise, almost out of course, once an irregularity or defect is established in the impugned proceedings, would be to debase this great remedy."

25. In *Gorman v. Judge Mary Martin and Another* [2005] IESC 56 (Unreported Supreme Court 29th July 2005), the first Respondent pleaded guilty to the offence of assault causing serious harm in the Circuit Criminal Court and was sentenced to eight years imprisonment. The first Respondent's contention that the District Court wrongly failed to conduct a preliminary examination and that he should have been allowed to have a deposition taken of a particular individual was upheld by the High Court. Thus, the case was not properly before the Circuit Court when the matter was finally dealt with. In his judgment, Kearns J. (as he then was) stated:

"Had the applicant pleaded not guilty and had he canvassed his point at this trial by the second named respondent (the learned Circuit Court Judge) I must confess I might have arrived at a different conclusion in this matter. That said however, the applicant's plea of guilty suggests that there are no merits in this case which would warrant this court exercising its jurisdiction on discretionary grounds to set aside the conviction. Indeed, all discretionary factors strongly suggest to me that the opposite is the case. To set aside the conviction now in circumstances where the accused pleaded guilty, and to remit the matter back to the District Court when it is unclear whether or not a trial can ever take place, would strike me as an inappropriate exercise by this court of this direction."

26. In *State (Byrne) v. Frawley* [1978] IR 326, Henchy J. stated at 350 the following:

"Because the prisoner freely and knowingly elected at his trial to accept the empanelled jury as competent to try him, I consider that he is now precluded by that election from claiming that the jury lacked constitutionality. The prisoner's approbation of the jury was affirmed by his failure to question its validity when he formulated grounds of appeal against his conviction and sentence, and when his application for leave to appeal was argued in the Court of Criminal Appeal."

27. In the *Gorman* case it is relevant to note that there was a significant delay in the initiation of the judicial review proceedings, and a recognition of the fact that the quashing of the conviction and sentence might give rise to difficulties in holding a trial because witnesses might no longer be available or other relevant evidence might have disappeared or been disposed of. These considerations do not arise in the present appeal.

28. Undoubtedly in this case the first Respondent was very much the author of his own misfortune, insofar as it can be said that he received prison sentences in respect of the non Donegal offences to which he pleaded guilty in Letterkenny District Court. It was certainly not an outcome which was in any way forced upon him. On the other hand, the conviction and the resulting prison sentences in this case were orders made without lawful basis, and were void *ab initio*. They resulted from a jurisdictional error on the part of the second Respondent. It is therefore my view, albeit it with some degree of misgiving, having regard to the very significant degree of acquiescence on the part of the first Respondent and his lack of merits that he is entitled to the relief afforded to him in the High Court.

29. I would therefore dismiss the appeal and affirm the Orders made in the High Court.