

THE HIGH COURT

2011 233 JR

Between:

Joseph Farrell

Applicant

And

Judge Geoffrey Browne

AND

The Judges of the Circuit Court

And

The Director of Public Prosecutions

Respondents

Judgment of Mr Justice Michael Peart delivered on the 7th day of February 2012:

1. On the 21st September 2010 the applicant was brought before a Roscommon District Court having been earlier that day arrested and charged with three offences alleged to have been committed by him on the 11th May 2007, one being under Sections 15A and 27A of the Misuse of Drugs Act, 1977 (as inserted), being an offence triable on indictment only, and two offences under the Misuse of Drugs Regulations 1988 and 1993 and contrary to Sections 15 and 27 (as amended) of the Misuse of Drugs Act, 1977. The latter two offences are so-called hybrid offences where they may be tried summarily or, with the consent of the DPP, on indictment. On that occasion he was remanded on bail by the first named respondent to appear again on the 5th October 2010. On the 5th October 2010 the applicant was again remanded on continuing bail to reappear before the Court on the 2nd November 2010 for service of a Book of Evidence.

2. On the 2nd November 2010, he again appeared, and his solicitor Michael Finucane was informed that the Book of Evidence was not ready. Mr Finucane has averred that he was instructed by his client, who denies these charges, to object to any extension of time for service of the Book of Evidence in view of the lengthy gap between the date of the alleged offences and the charges being brought against his client. It is averred that on this date the Garda presenter applied to the first named respondent for an extension of time for the service of the Book of Evidence and that this application was granted by the first named respondent who thereupon remanded the applicant on continuing bail to reappear before the Court on the 16th November 2010. Mr Finucane goes on to state that these orders were made without him having been afforded an opportunity to make submissions and to object to the application for an extension of time, and that he thereupon informed the first named respondent that he had wished to be heard before any decision was made, and that he wished it to be put on the record that he would have objected had he been afforded an opportunity to do so in advance of the decisions being made.

3. It appears that thereafter, Mr Finucane was invited by the first named respondent to make his submissions in relation to the extension of time, but he declined to do so stating that it would be pointless to do so after the decision had already been made, and that little would be achieved in going through the motions of making such submissions and stated also that *"this would only serve to discredit the proceedings and the court process by divesting it of the appearance of fairness and due process"*. Mr Finucane goes on to state that the first named respondent persisted with his invitation to him to make his submissions, but that he repeated his view that to do so at that stage would be futile in circumstances where the order had already been made.

4. In paragraph 9 of his grounding affidavit, Mr Finucane describes what then occurred as follows:

"I say that the first named respondent then confirmed he was minded to remand the accused on continuing bail to 16th November 2011 for service of the Book of Evidence. However, he went on to state that he considered it unnecessary to extend time for service of the Book of Evidence, as the extra date, 16th November 2011, would still be within the period of 42 days normally allowed for service of the Book of Evidence. No further submissions were made following the ruling by either prosecution or defence"

5. The orders made on that date by the first named respondent are exhibited and show that the applicant was simply remanded on continuing bail on each charge to the 16th November 2010, and there is no reference to any extension of time being granted for the service of a Book of Evidence. On the 16th November 2010 the Book of Evidence was served on the applicant, and it is submitted on the present application that by that date a period of 56 days had passed since the applicant had first appeared at the District Court on the 21st September 2010, and that in the absence of an extension of time being granted by the first named respondent, the Book of Evidence was served outside the time permitted for so doing under the provisions of Section 4B(1) of the Criminal Procedure Act, 1967, as inserted by Section 9 of the Criminal Justice Act, 1999 and as amended by Section 37(b) of the Criminal Procedure Act, 2010.

6. In support of the respondents' Statement of Opposition, two affidavits are filed, one by Superintendent Paul Glynn who was present at the District Court on the 2nd November 2010, and one by Kieran Madigan, State Solicitor for County Roscommon, who represented the Director of Public Prosecutions, when the matter was before the District Court on the 16th November 2010 and who served the Book of Evidence on the applicant that day before the case was called. Superintendent Glynn deposes that on the 2nd November 2010 when the applicant's case was called he informed the first named respondent that he had "just" received directions from the DPP that the applicant should be prosecuted on indictment, and requested that the applicant be remanded on continuing bail for service of a Book of Evidence and for an order returning him for trial in the Circuit Criminal Court. He states that his request was acceded to, and that the first named respondent stated that he was extending time for service of the Book of Evidence, at which point Mr Finucane informed the Court that it had been his intention to object to the extension of time for service of the Book of

Evidence since the offences dated back to 2007 and that he had wished also to raise issues as to delay. He goes on to confirm that Mr Finucane was asked what issues he wished to raise but that he stated that there was no point in raising them as the first named respondent had already made up his mind. He states further that the first named respondent indicated that he was prepared to vacate his order in order to give Mr Finucane an opportunity to raise any issues he wished to raise, but that Mr Finucane repeated that he saw no point in doing so at that stage. Superintendent Glynn states also that the first named respondent then vacated the order he had made, and asked him what application he was making, whereupon Superintendent Glynn stated that he was seeking a remand on continuing bail to the 16th November 2010 for service of a Book of Evidence. He also apparently informed the first named respondent that the instructions from the DPP "*had just arrived and therefore that according to Section 37 of the Criminal Procedure Act 2010, the 42 day rule did not apply in these circumstances*". The first named respondent acceded to that application.

7. Kieran Madigan, State Solicitor, states in his affidavit that on the 16th November 2010 he represented the DPP and made an attendance note of what occurred at Roscommon District Court on that date for transmission to the DPP, in accordance with standard practice in that regard. He has exhibited a copy of that attendance note which, inter alia, notes that he informed the first named respondent that he had that morning served the Book of Evidence, and informed him also that he was confirming the consent of the DPP pursuant to Section 4(a)(2) of the Criminal Procedure Act, 1967 to the return for trial to Roscommon Circuit Court on Tuesday the 18th January 2011 at 10.30 and "*that I was conveying that consent orally pursuant to Section 4(3)(b) of the Prosecution of Offences Act, 1974*". The note states also that the accused was returned for trial on continuing bail, and a formal alibi notice was given to the applicant, following which Mr Finucane indicated that the charges date back to 2007 and that the alibi notice might be tainted in that context and that he was alerting the court to that fact at the earliest opportunity. It is noted also that Legal Aid was granted.

Legal submissions:

8. The applicant seeks to quash the order made by the first named respondent on the 2nd November 2010 remanding the applicant without invocation of, and disregarding any extension procedure under Section 4B (3) of the Act of 1967 as amended, and the order made on the 16th November 2010 returning the applicant for trial, as well as certain declaratory reliefs related thereto.

9. The questions which arise are whether the first named respondent erred in law on the 2nd November 2010 when he ordered that the applicant be remanded on continuing bail to the 16th November 2010 for service of a Book of Evidence, without making any order for an extension of time for service of the Book of Evidence, and whether on the 16th November 2010 he erred in law and acted in excess of jurisdiction when he returned the applicant for trial following the service on that date of the Book of Evidence. 10. Central to the submissions made by Luán Ó Braonáin SC for the applicant and Tom O'Malley BL for the respondents are certain provisions of Sections 4A and 4B of the Act of 1967 as amended, within Part 1A thereof, which provide, as relevant:

"Part 1A – Proceedings Relating to Indictable Offences

"4A. – (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 section 13, or

(c) the accused is unfit to plead.

(2) The accused shall not be sent forward for trial under section (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 section 4B (1) have been served on the accused.

4B.— (1) (a) Subject to subsection (3), the prosecutor shall cause the documents specified in paragraph (b) to be served on the accused or his or her solicitor (if any) not later than 42 days from the date on which –

(i) the accused, on being informed by the District Court of his or her right to be tried by a jury, objects to being tried summarily or the prosecutor informs the court that he or she does not consent to the person being tried summarily for the offence concerned or,

(ii) in the case of an offence in respect of which the prosecutor may elect to prosecute either summarily or on indictment, the prosecutor elects to try the offence on indictment, or

(iii) the District Court determines that the facts alleged do not constitute a minor offence and are not fit to be tried summarily.

(b) The documents referred to in paragraph (a) are:

(i) a statement of the charges against the accused;

(ii) a copy of any sworn information in writing upon which the proceedings were initiated;

(iii) a list of the witnesses the prosecutor proposes to call at the trial;

(iv) a statement of the evidence that is expected to be given by each of them;

(v) a copy of any document containing information which it is proposed to give in evidence by virtue of Part II of

the Criminal Evidence Act 1992 ;

(vi) where appropriate, a copy of a certificate under section 6(1) of that Act;

(vii) a list of the exhibits (if any)."

(2) As soon as the documents mentioned in subsection (1) are served, the prosecutor shall furnish copies of them to the District Court.

(3) On application by the prosecutor, the District Court may extend the period within which the documents mentioned in subsection (1) are to be served if it is satisfied that—

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

(b) it would be in the interests of justice to do so.

(4) An application may be made and an extension may be granted under subsection (3) before or after the expiry of—

(a) the period of 42 days mentioned in subsection (1), or

(b) any extension of that period granted under subsection (3).

(5) Where it refuses to grant an extension, the District Court shall strike out the proceedings against the accused in relation to the offence.

(6) The striking out of proceedings under subsection (5) shall not prejudice the institution of any proceedings against the accused by the prosecutor.

11. It is relevant to refer to the fact that the charge brought against the applicant under Section 15A of the Misuse of Drugs Act, 1977 is triable on indictment only, whereas the two charges under Section 15 thereof may be tried either summarily or on indictment where the DPP does not consent to summary disposal. I will refer to the latter as "hybrid offences". The relevance of that is that when one reads Section 4B it appears to provide for a 42 day period for service of a Book of Evidence only in respect of a hybrid offence, given the manner in which Section 4B(1)(a)(i),(ii) and (iii) are worded. If that is so, then the question has arisen in argument as to whether there is in fact, intentionally or otherwise, no period provided for the service of the Book of Evidence for indictable offences at all. Section 4A clearly refers to indictable offences, and subsection (5) of Section 4A merely states that "*the accused shall not be sent forward for trial under subsection (1) until the documents mentioned in section 4B (1) have been served on the accused*", but does not refer to the 42 day period or any period for service of the Book of Evidence.

12. That issue apart for the moment, the applicant submits that if the 42 day period applies to the indictable offence under Section 15A of the Act of 1977, the question arises as to the correct date from which that period must be calculated, and submits that it must be calculated from the date on which the applicant was first before the District Court and charged with that offence on the 21st September 2010. That was clearly the position under Section 4B(1) as originally enacted since it was the provided as follows:

"(1) where the prosecutor consents to the accused being sent forward for trial, the prosecutor shall, within 42 days after the accused first appears in the District Court charged with an indictable offence cause the following documents to be served on the accused or his solicitor (if any) etc.....". (emphasis added)

13. Mr Ó Braonáin submits that in so far as Section 4B provides that the Book of Evidence must be served within 42 days of certain matters occurring as set forth in paragraphs (i), (ii) and (iii) thereof, those various matters are relevant only to a hybrid case and not to an indictable offence. It is submitted that the time for service of the Book of Evidence cannot be calculated by reference to any of those events, and that unless the Court is to hold that there is no time limit provided in respect of an indictable offence, and it is submitted that to so hold would lead to an absurdity, then it ought to be concluded that the 42 day period commences from the date on which the accused is first brought before the District Court – in this case the 21st September 2010, and that accordingly by the 2nd November 2010 that period had elapsed, and absent an order extending time for service of the Book of Evidence, the only order the first named respondent had power to make was one striking out the proceedings as he may only send the accused forward for trial after the accused has been served with the Book of Evidence as provided by Section 4A(5). In such circumstances it is submitted that the first named respondent was wrong in concluding on the 2nd November 2010 that no extension of time was required on that date. He had reached that conclusion on the basis that it was only on that date that the Court was informed that the DPP had given a direction that the applicant should be tried on indictment according to the evidence of Superintendent Glynn who has stated that he had "just" received those instructions that day. In that regard, I should note that Section 4B(2) provides that "the accused shall not be sent forward for trial under section (1) without the consent of the prosecutor."

14. However, there is no reference anywhere to the 42 day period being calculated from the date of such a direction being received.

15. In addition, Mr Ó Braonáin has submitted that no direction that the accused be tried on indictment is necessary since the Section 15A offence may not be tried any other way. It can only be tried on indictment, and it is submitted that the very act of charging the applicant with that offence is an indication that the DPP consents to trial on indictment. Nevertheless Section 4A clearly requires in respect of an indictable offence that the DPP consents to the accused being sent forward for trial, which indicates that the mere fact that an indictable charge has been laid is not to be taken as such a consent on the basis that the case cannot be tried any other way.

16. I should mention the relevant District Rules also. Order 24 RDC is the relevant rule in relation to service of a Book of Evidence. On the 2nd November 2010, Order 24 was as provided for in S.I. No. 201 of 2005, which had made provision for the procedures applicable following the passing of the Criminal Justice Act, 1999 which first inserted a new Part 1A into the Act of 1967, and in particular sections 4A and 4B thereof as far as the present application is concerned, which as already set forth provided clearly for the service of a Book of Evidence in respect of an indictable charge within 42 days of the accused's first appearance before the District Court, where the DPP has consented to the accused being sent forward for trial.

17. However, following the amendment to Section 4B brought about by Section 37 of the Act of 2010 as set forth already (which came into operation by virtue of S.I. 414 of 2010 on the 1st September 2010) and which seems to make provision for the calculation of the 42 days by reference to matters applicable only to a hybrid offence, the relevant District Court Rule (Order 24) remained unaltered until the passing of S.I. 585 of 2011 which came into operation only on the 10th December 2011, almost a year after the 2nd November 2010. The new rule in Order 24 DCR follows the scheme of new Section 4B and provides that the Book of Evidence shall not be served later than 42 days from the various events set forth in section 4B and which, as I have said, seem to be relevant only to a hybrid offence. This leads to the unsatisfactory situation whereby on the 2nd November 2011 the applicable Order 24 provisions are those which were intended to serve the original Section 4B provisions, and did not reflect the new Section 4B provisions. However, as Mr O'Malley has submitted, it could not be the case that a District Court rule could trump a new statutory provision, and the latter must prevail whatever the current rule might otherwise provide.

18. So we are left with a statutory provision making new provision for the service of a Book of Evidence within 42 days of certain events relevant to a hybrid offence, and there appears to be no statutory provision which explicitly and clearly makes provision for any time limit for the service of a Book of Evidence where the offence is an indictable offence only, even though the original incarnation of Section 4B was clearly enacted in order to so provide. But it was replaced in 1999 by a provision which, perhaps accidentally, omitted to include a provision providing for the service of a Book of Evidence within any particular period from the date of an accused person being charged, even though in Section 4B (5) thereof it is provided that *"the accused shall not be sent forward for trial under subsection (1) until the documents mentioned in section 4B (1) have been served on the accused."* As I have already set forth, the applicant submits that in these circumstances the 42 day period must be considered to commence for an indictable only offence on the first date on which the accused person is brought before the District Court.

19. Tom O'Malley BL for the respondents referred to the provisions contained in the original Act of 1967 which provided for a preliminary examination where a person was being prosecuted for an indictable offence, and which provided in Section 6 thereof for the service of certain documents to be served on the accused. That section did not provide for any time limit for the service of these documents, but rule 5 of the District Court (Criminal Procedure) Rules, 1967 provided that they be served on the accused *"at the earliest opportunity, but save with the leave of the Court, shall not be served later than thirty days after the first appearance of the accused before the Court"*. He refers then to the procedural changes effected by the Act of 1999 whereby the preliminary examination was removed and replaced by the provisions contained in Part 1A of that Act, which include Section 4A and 4B as then enacted, whereby a person accused of an indictable offence must be sent forward for trial (unless the case is being dealt with under Section 13 of the Act of 1967 – i.e. on a plea of guilty), provided that the DPP consents and provided also that a Book of Evidence is served on the accused. He refers to the clear provision of Section 4B as originally enacted which made it clear that the Book of Evidence had to be served within 42 days after the accused first appears in the District Court unless that period was extended under subsection (3) thereof. Mr O'Malley then refers to the change wrought by Section 37 of the Act of 2010 which left in tact Section 4A, but in new Section 4B completely removed any reference to "the indictable offence" and proceeds to refer to the commencement of the 42 day period, as set forth above already, by reference to matters applicable only to a hybrid offence i.e. not later than 42 days from the date on which:

"(i) the accused, on being informed by the District Court of his or her right to be tried by a jury, objects to being tried summarily or the prosecutor informs the court that he or she does not consent to the person being tried summarily for the offence concerned or,

(ii) in the case of an offence in respect of which the prosecutor may elect to prosecute either summarily or on indictment, the prosecutor elects to try the offence on indictment, or

(iii) the District Court determines that the facts alleged do not constitute a minor offence and are not fit to be tried summarily."

20. Mr O'Malley has submitted that whether deliberately or not, the new provision in Section 4B substituted by Section 37 of the Act of 2010 does not cover the situation where the offence being prosecuted is one which may be prosecuted on indictment only, and that accordingly there is no period specified, 42 days or otherwise, within which the Book of Evidence must be served in such a case. He submits that while this situation may not have been intended by the Oireachtas, it nevertheless does not lead to an absurdity, or make the procedure inoperable, since in any event the general rules of common law would undoubtedly require that the Book of Evidence be served within a reasonable time. In such circumstances, he submits that it is not necessary or would not be permissible for this Court to apply such a teleological interpretation by which the Court would be in effect reading into Section 4B an additional clause, such as *"in any other case, the Book of Evidence shall be served within 42 days of the accused first appearing in the District Court"*, which was the provision in the old Section 4A and which the Oireachtas seems to have specifically removed when it enacted the amendment provided by the Act of 2010. He submits that this is what the applicant seeks to argue for in the present application.

21. Mr O'Malley submits accordingly that the first named respondent was correct to consider on the 2nd November 2010 – which was only 2 months after the commencement of the amendment provided by the Act of 2010 – that the 42 day period did not apply to the Section 15A charge, and, that in relation to the hybrid offences, since the DPP had only that day made his election to have them tried on indictment as indicated by Superintendent Glynn for the purposes of Section 4B(1)(ii) of the Act of 1967 as amended, the service of the Book of Evidence in respect of those offences was within time.

22. I am satisfied that the submissions made by Mr O'Malley are correct. I doubt very much whether the Oireachtas intended that the amendment which it made by the Act of 2010 should result in the removal of any specific time limit for the service of a Book of Evidence on a person accused of an offence triable only on indictment. Nevertheless, Section 37 of the Act of 2010 is clear and unambiguous. Section 5 of the Interpretation Act, 2005 provides that where a statutory provision is obscure or ambiguous or where a literal interpretation would be absurd or would fail to reflect the plain intention of the instrument as a whole *"the provision shall be given a construction that reflects the plain intention of the maker of the instrument where that intention can be ascertained from the instrument as a whole in the context of that enactment"*. Section 4(1) of that Act provides that *"a provision of this Act applies to an enactment except in so far as the contrary intention appears in this Act, in the enactment itself or, where relevant, in the Act under which the enactment is made"*.

23. While the new Section 4B may have unintended consequences, it is not unclear or ambiguous. The intention of the Oireachtas must be gleaned from the words used in the new section, and that intention is clear in the present case from the words used. The time limit can only apply to a hybrid offence, and, unlike the section's predecessor, no period is provided for in respect of an offence triable on indictment only. To read the section otherwise and as contended for by the applicant would be to do violence to the Act and to read into it something which is clearly not there, and that is impermissible. It is a matter for the Oireachtas to amend the section once again, if it wishes to provide for a specific time limit for the service of the Book of Evidence in the case of an offence triable only on indictment.

24. In these circumstances I am satisfied that the reliefs sought should be refused and I will so order.