2005 IEHC 257

THE HIGH COURT

[Record No.2001 346JR]

BETWEEN

ROBERT ROBINSON

APPLICANT

AND

DISTRICT JUDGE JOHN O'DONNELL THE DIRECTOR OF PUBLIC PROSECUTIONS THE CIRCUIT JUDGE FOR THE COUNTY OF DONEGAL

RESPONDENTS

Judgment of Mr.Justice Hanna delivered on the 20th day of July, 2005

1. This case comes before me as an application for judicial review seeking an order of certiorari quashing a return for trial dated 2nd February, 2001, and an order of prohibition, or, in the alternative, an injunction, restraining the respondents from taking any further steps in certain criminal proceedings the subject matter of this application.Leave to apply for judicial review was granted by Kinlen J.on 28th May, 2001.The applicant sought to rely upon twelve individual grounds and was granted leave to rely on ten of them numbered 3-12 inclusive.They were as follows:-

> 3. The first named respondent erred in law and in excess or want of jurisdiction in holding that the applicant's prosecution by the second named respondent had not been delayed so as to prejudice his chance of obtaining a fair trial.
>
> 4. The first named respondent erred in law and in excess or want of jurisdiction in holding that there had been no blameworthy delay by the second named respondent in the prosecution of the applicant.
>
> 5. The first named respondent erred in law and in want or excess of jurisdiction in holding that the applicant had not been prejudiced by the delay of the second named respondent whereby the applicant has been denied his right of election to have the charges against him tried summarily in the District Court.
>
> 6. The first named respondent erred in law and in excess or want of jurisdiction in holding that the applicant had not been actually prejudiced by the delay of the second named respondent in prosecuting the applicant.
>
> 7. The first named respondent erred in law and in excess or want of jurisdiction in failing to ensure that the applicant's Constitutional right to a fair trial in due course of law was vindicated.
>
> 8. The second named respondent is guilty of unwarranted and excessive delay in prosecuting the applicant on charges of assault, alleged to have occurred on 20th June, 1999.
>
> 9. The second named respondent has so delayed the prosecution of the Applicant herein that there is a real and serious risk that he will not be able to receive a fair trial on the charges alleged against him.
>
> 10. The second named respondent has delayed the prosecution of the Applicant such that he has been denied his right of election to have the charges alleged him tried in the District Court.
>
> 11. The second named respondent has so delayed the prosecution of the applicant herein that he has been exposed to a greater penalty for the offences alleged against him than if same had been tried in the District Court at the applicant's election.
>
> 12. The second named respondent did not institute the prosecution within the required time period.

The Facts

2. The charge which the applicant faces arises from an alleged incident which occurred on or about 20th June, 1999, at Bundoran in the County of Donegal.The next day, 21st June, 1999, the alleged victim complained to the Gardaí at Bundoran Garda Station.On 4th September, 1999, the alleged injured party purported to identify the applicant who was then interviewed on 2nd October by the Gardaí.Around that time, a medical report was obtained concerning the alleged injured party who also made a statement relating to the identification of the applicant and, on 16th November, 1999, the Garda file was received by the State Solicitor for the County of Donegal.The file was subsequently forwarded by the State Solicitor to the Director of Public Prosecutions on 20th January, 2000, leading to a direction on 23rd February, 2000, that the applicant be tried on indictment.I will turn shortly to the substance of the charge against him.On 10th March, 2000, a summons issued which, on 7th April, 2000, was made returnable to Ballyshannon District Court.On 21st April, at Ballyshannon District Court, the prosecutor indicated that the matter was to be tried on indictment and the applicant indicated that he was pleading not guilty.The matter was adjourned to 21st July for preparation of the book of evidence.

3. On 21st July, the solicitor for the applicant indicated that he would be making submissions with regard to delay and to service of the summons.Submissions were made on 3rd November, 2000 and these submissions dealt, *inter alia*, with the issue of prosecutorial delay.During the course of the hearing before me, I was informed by counsel for the applicant, Mr.O'Reilly S.C., that the applicant's solicitor had in his mind the principal argument which the applicant has advanced before me at the hearing of this review.There was good reason for this since his firm had acted for the defendant in the case of *Director of Public Prosecutions v.William Logan* [1994] 3 IR 254 in which the Supreme Court deliberated upon legislation with some of which we are presently concerned.This included the six month time limit for the institution of summary proceedings provided for in section 10 paragraph 4 of the Petty Sessions (Ireland) Act 1851.However the argument was not specifically articulated before the learned District Court Judge since the Applicant's solicitor was not then aware of the date or circumstances of the decision to prosecute by way of indictment rather than summarily.The timing of that decision is fundamental to the argument advanced on the Applicant's behalf.The Logan case was relied upon before me by both parties and I will return to it in greater detail shortly.

4. The District Judge rejected the submissions offered on behalf of the applicant on 5th January, 2001.A bench warrant was issued due to the absence of the applicant on that date.This bench warrant was executed by agreement on 2nd February, 2001, on which date the applicant was sent forward for trial to Donegal Circuit Court.

5. The applicant now faces a charge pursuant to s.3 of the Non Fatal Offences Against the Person Act, 1997.That section provides

as follows:

> "3.– (1) A person who assaults another causing him or her harm shall be guilty of an offence.
>
> (2) A person guilty of an offence under this section shall be liable –
>
> (a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding £1,500 or to both, or
>
> (b) on conviction on indictment to a fine or to imprisonment for a term not exceeding 5 years or to both."

6. Once leave was granted, a considerable number of affidavits were exchanged between the parties during the course of which the following letter, dated 23rd February, 2000, from the Director of Public Prosecutions to the Donegal State Solicitor emerged as an exhibit to the affidavit of one Marianne Dee sworn on 9th January, 2002:-

> "RE: ROBERT ROBINSON AND FEDERICK QUINN/ASSAULT
>
> Dear Sir,
>
> I refer to your letter dated the 20th day of January 2000 enclosing the Garda report in the above matter.
>
> The assault on Ronan McCann was a serious assault in which a weapon was used and would warrant a prosecution on indictment.
>
> The other incident would only warrant summary proceedings and as the time limit is now passed no further action can be taken arising out of them.
>
> The suspect's (sic) are to be prosecuted in respect of an assault contrary to s.3 of the Non-Fatal Offences Against The Person Act and the charge is to be dealt with on indictment.
>
> I enclose Case Report Form
>
> _____
>
> Declan Murphy
>
> Professional Officer"

7. The applicant's solicitors were conscious of the fact that the six month time limit provided for in the Petty Sessions Act had passed.They then wished to have sight of the letter of 20th January, 2000, referred to in the above correspondence.This led to an application for discovery which was initially unsuccessful but, *en route* to the Supreme Court, yielded a copy of the following letter.

> "**Re: Robert Robinson and Frederick Quinn Alleged Assault Causing Harm – 20th June, 1999**
>
> Dear Sir,
>
> We enclose herewith a copy of Garda File herein for your attention.
>
> The (sic) regret the delay in forwarding same to you due to a complete oversight on our part.
>
> The facts of this matter are that in the early hours of the morning of the 20th June, 1999 the Gardaí at Bundoran, Co.Donegal, were made aware that an incident had taken place outside a Disco in the Town called "Planet Earth".A young man, Ronan McCann had a cut to his ear and was shaking (sic) as a result of being attacked by a group of Bouncers.It would appear that he had been struck with a stick by one of the Bouncers.
>
> Apparently, the Bouncers had left the Planet Earth Disco and went to the Hollywood Hotel, where they also work.They met up with the Bouncers who were working in that establishment and they decided to go, as a group, to sort out some local youths who were giving trouble to them in the Town.
>
> It would appear that most of these Bouncers are from Northern Ireland and that a feud had developed between these Bouncers and group of local youths.It would appear that matters came to a head on this particular night.Unfortunately, Mr.Ronan McCann may have been an innocent victim and it would appear that he was assaulted by Robert Robinson and Frederick Quinn and as a result he suffered this injury.
>
> The time limit for the institution of Summary Proceedings has now passed.In these circumstances we were wondering whether you would consider a prosecution on Indictment under Section 3 of the Non Fatal Offences Against the Person Act, 1997 as the Injured Party required eleven sutures over the front of his left ear and three sutures on the back of his left ear.
>
> We would be obliged for your directions in relation to this matter in early course.
>
> Yours faithfully,"

8. The applicant points to this as proof positive that no decision had been taken prior to the expiry of the six month period to prosecute the applicant summarily or otherwise.Nothing had been decided until after the time limit had expired.The reason why the applicant was now facing trial on indictment was that the summary option was no longer available.

Statutory Background and Arguments

9. I have already set forth the statutory provision which founds the charge preferred against the applicant.Section 10(4) of the Petty

Sessions (Ireland) Act, 1851, is familiar territory indeed to anyone who has appeared either as counsel or solicitor or indeed as prosecuting Garda before the District Court in this jurisdiction.For the sake of completeness only I will set it out here:-

> "In all cases of summary jurisdiction the complaint shall be made, when it shall relate to the non-payment of any poor-rate, county-rate, or other public tax, at any time after the date of the warrant authorizing the collection of the same; and when it shall relate to the non-payment of money for wages, hire, or tuition, within one year from the termination of the term or period in respect of which it shall be payable; and when it shall relate to any trespass, within two months from the time when the trespass shall have occurred; and in any other case within six months from the time when the cause or complaint shall have arisen, but not otherwise."

10. Section 7 of the Criminal Justice Act, 1951, exempts indictable offences from the ambit of para.4 of s.10 of the 1851 Act.It provides:-

> "Paragraph 4 (which prescribes time limits for the making of complaints in cases of summary jurisdiction) of section 10 of the Petty Sessions (Ireland) Act, 1851, shall not apply to a complaint in respect of an indictable offence."

11. The Criminal Justice Act, 1951 provides, *inter alia*, a list of "scheduled offences" which might be tried summarily provided the preconditions of s.2 of that Act are met.What complaints in respect of an indictable offence are exempted from the prescribed time limit in para.4 of s.10 of the Petty Sessions (Ireland) Act, 1851? In the unanimous judgment of the Supreme Court in Director of Public Prosecutions v.Logan [1994] 3 IR 255 Blaney J.says at p.262:-

> "I think it is quite clear in the first place that the phrase 'complaint in respect of an indictable offence' refers to a complaint in respect of an indictable offence which is a 'scheduled offence' as defined by s 2 of the Act of 1951, and may be tried summarily by the District Court under s 2, sub-s 2 provided that the conditions set out in that sub-section are satisfied.Since s 7 provides that s 10, sub-s 4 of the Petty Sessions (Ireland) Act, 1851, shall not apply, the section must be dealing with a situation in which s 10 would otherwise apply, or otherwise might apply, and so can only be dealing with a complaint in respect of an indictable offence which the District Court has jurisdiction to try summarily under s 2, sub-section 2.And the probability is that the draftsman of the section took the view that s 10, sub-s 4 of the Act of 1851 would apply by reason of the decision of the Supreme Court in the Attorney General v Conlon [1937] IR 762 and that the purpose of the section was to overrule that decision.That is certainly the effect of the section.But whether this was intended or not it is quite clear that the term "indictable offence" in this section must mean an indictable offence which is a scheduled offence under s 2 of the Act of 1951, and which the District Court has jurisdiction to try summarily under the same section."

12. Thus, argues the applicant, since s.3 of the Non Fatal Offences Against the Person Act, 1997, is not a scheduled offence in accordance with the Criminal Justice Act, 1951, and is not, therefore, *an indictable offence* for the purposes of s.7 thereof, the six month time limit applies.Section 3 is described by the applicant's counsel as a "hybrid" offence being one that is triable either in a summary manner or upon indictment.If the option of proceeding by way of indictment was not chosen within that period it was not available to the prosecutor outside it.

13. Counsel for the respondent, Mr.Rossa Phelan B.L., disputed this assertion.The six month time limit did apply but only to the summary aspect of the offence to be found in s.3(2)(a).Once six months had passed, he argued, the summary option was no longer available to the Director of Public Prosecutions who then had no option, should he decide to prosecute, other than to go by way of indictment.This was not a scheduled offence.

14. In any event, Mr.Rossa Phelan argued, there was no time limit in this jurisdiction on trial by indictment.Cases are regularly brought dealing with offences committed many years ago such as, for example, sex offence cases.

15. The second main point of contention was whether or not there had been delay on the part of the applicant in bringing the within judicial review proceedings.Order 84 Rule 21(1) of the Rules of the Superior Courts provides as follows:-

> "An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is *certiorari*, unless the court considers that there is good reason for extending the period within which the application shall be made."

16. The respondents contend that the starting gun, as it were, was fired on or around 21st April, 2000, when it was made clear that the prosecutor intended to proceed by a way of indictment.Certainly, by the time the book of evidence was served in July, 2000, the applicant could have been in no doubt whatsoever that he was going to face trial.The applicant, on the other hand, argued that up until such time as the return for trial occurred, in February, 2001, his lawyers were engaged in attempting to prevent the trial on the basis of legal argument.

Conclusion

17. It is apparent from s.3 of the Non Fatal Offences Against the Person Act, 1997, that the offence of assault causing harm created thereby leaves open a prosecution by way of summary proceedings (s.3(2)(a)) or on indictment (s.3(2)(b)).Of course, in terms of the potential penalty the implications of a trial on indictment are substantially greater for an accused person.An accused person might wish, even in the event of an non guilty plea, to take his or her chance in a court where the stakes are not nearly as high in the event of a conviction.However, ultimately, the decision as to the procedural mechanics of the trial rests with the prosecutor taking into account, *inter alia*, such matters as the degree of harm caused to the alleged injured party.In his judgment in *Director of Public Prosecutions v.Logan* Blaney J.cited with approval the important authorities, the *Attorney General (O'Connor) v.O'Reilly (unreported)*, High Court, Finlay P., 29th November, 1976, O'Higgins C.J.in *The State (McEvitt) v.Delap* [1981] IR 125 and Finlay P.in *The State (Clancy) v.Wine* [1980] IR 228 showing that the method of prosecution was a matter for the complainant or the prosecution.At p.259 of his judgment he states:- "In the Attorney General (O'Connor) v.O'Reilly (Unreported, High Court, Finlay P, 29 November, 1976) which was a consultative case stated raising the question of whether a person charged with assault contrary to common law had the right to elect to be tried by a judge and jury, Finlay P (as he then was), having cited the sections of the act of 1861, and s 11 of the Act of 1951, commented on them at p 7 of his judgment as follows:-

> 'From these provisions a clear scheme of legislation appears to me to emerge which is that in the case of common assault or assault contrary to common law there are in existence two well recognised methods of prosecution, one being a summary prosecution under section 42 of the Act of 1861 as amended by section 11 of the Act of 1951, and the second being a charge and prosecution upon indictment.For each there is a different maximum penalty and it is presumably the choice of the prosecution by which method the charge should be prosecuted.'

18. This statement of the law was approved by O'Higgins CJ in *The State (McEvitt) v Delap* (1981) IR 125 at p 131:-

> 'A similar right as to choice of prosecution exists in the case of common assault or assault contrary to common law; this matter was fully dealt with in the judgment of the President of the High Court which was delivered on the 29 November, 1976, in The Attorney General (O'Connor) v.O'Reilly.'

19. In the *State (Clancy) v.Wine* [1980] IR 228, Finlay P (as he then was) followed his previous decision in *The Attorney General (O'Connor) v.O'Reilly*.He said in his judgment at p 231:-

> 'In a judgment delivered by me on the 29 November, 1976, in *The Attorney General (O'Connor) v.O'*Reilly, I decided that there were two methods of prosecuting an offence of assault contrary to common law.The first method is a summary prosecution pursuant to s 42 of the Act of 1861, as amended by s 11 of the Act of 1951, which provides for a maximum penalty of six months imprisonment or a fine not exceeding £50 upon conviction.The second method of prosecuting for that offence is upon indictment pursuant to s 47 of the Act of 1861, in which case the maximum penalty is imprisonment for any term not exceeding one year.In O'Reilly's case I also held that the choice of the method of prosecution was a matter to be decided by the complainant or the prosecution, and that the accused person did not have the right to choose between summary prosecution and prosecution upon indictment'."

20. The *Logan* case was relied on extensively by counsel for both parties in this application.That case involved a prosecution by summary proceedings of the defendant for assault contrary to common law under s.42 of the Offences Against the Person Act, 1861, and s.11 of the Criminal Justice Act, 1951.An alternative mechanism for prosecuting the defendant on indictment was to be found at s.47 of the Act of 1861.The charges were dismissed by the District Court Judge on the ground that the proceedings had not been initiated (in that instance by the application for the issuing of the summons) within the period of six months from the date of the alleged offence.In circumstances where the prosecution had decided to deal with the case summarily.Thus, the circumstances of the *Logan* case are quite the opposite to the circumstances of the instant case.Here, the prosecution seeks to try the applicant on indictment and has abandoned the summary route.In the *Logan* case, it was argued on behalf of the Director of Public Prosecutions that the nature of the offence did not change by reason of the manner in which it was prosecuted.If it was an offence capable of being tried on indictment then it was an indictable offence for the purposes of s.7.This proposition was rejected by the Supreme Court.Section 7 referred to scheduled offences, that is those offences appearing in the schedule to the 1951 Act or added thereto by order.This did not confer on summary proceedings the character of trial on indictment.At p 263 of his judgment in the *Logan* case, Blaney J.construed s.7 of the Act of 1951 in the following way:-

> "I am satisfied therefore that s 7 of the Act of 1951 does not apply to prosecutions under s 42 of the Act of 1861 for assault contrary to common law and that the learned High Court Judge was incorrect in holding that it did.He based his conclusion on an earlier decision of Barron J in *McGrail v Ruane* [1989] ILRM 498 in which it had been held that s 7 of the Act of 1851 did apply to a summary prosecution for assault contrary to common law.Barron J held, at p 500 of the report, that the proper construction of the section was that 'the time-limit does not apply to a charge of assault however it is tried'.It is clear from the report of that case, however, that neither the unreported judgment of Finlay P (as he then was) in the *Attorney General (O'Connor) v O'Reilly* (Unreported, High Court, Finlay P, 29 November, 1976) nor *The State (Clancy) v Wine* [1980] IR 228 were cited to Barron J and it seems to me that if they had been he probably would have taken a different view.It is necessary now that this Court should overrule the decision in *McGrail v Ruane* [1989] ILRM 498.
>
> There is a further reason also why in my opinion s 7 should be construed in the manner I have indicated.In *Seward v 'Vera Cruz'* (1884) 10 Cas.59 the Earl of Selborne LC said at p 68:-
>
> > 'Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so.'
>
> It seems to me that this principle is applicable in construing s 7 of the Act of 1951.The words 'complaint in respect of an indictable offence' are capable of 'reasonable and sensible application without extending them' since they clearly refer to a complaint of an indictable offence set out in the first schedule to the Act.And they are capable of this meaning without extending them in any way.There is no need to extend them to the offence of assault contrary to common law triable summarily under the Act of 1861 because that offence is also triable on indictment under s 47 of the same Act.There is no reason to extend the words to provide that s 10, sub-s 4 of the Act of 1851 should no longer apply to a prosecution under section 42."

21. Section 3 of the Non-Fatal Offences Against the Person Act 1997 creates two methods of prosecuting the offence of assault causing harm.Had the prosecution in this case sought to prosecute the applicant by way of summary proceedings then, in my view, this case would have been caught by the *Logan* case.However, the prosecution did not do this for reasons evident from the letters dated 20th January, 2000, from the Chief State Solicitor in Donegal to the Director of Public Prosecutions and the reply thereto dated 23rd February, 2000.The latter represents the decision of the lawful prosecution authority.Clearly time had elapsed as far as the summary route was concerned.However, the indictable route was still open.There was a choice to be made but it was not, at that stage, a choice between summary prosecution or prosecution on indictment.It was a choice between no prosecution or prosecution on indictment.The Director of Public Prosecutions decided to prosecute and the appropriate, indeed the only, mechanism to employ in the circumstances of this case was trial on indictment.In my view, this was not, as was argued on behalf of the applicant, an opportunistic prosecution.Serious and compelling reasons were offered for proceeding by way of indictment.In so doing, the Director of Public Prosecutions was not constrained by the time limit imposed by the Petty Sessions (Ireland) Act, 1851.

22. That would seem to deal with the first of two main issues as far as this Court is concerned.As noted above, no issue of prosecutorial delay was proceeded with before me and that would dispense with most of the grounds upon which relief was sought.The learned District Judge in my view did no more than his duty in processing this case and, where appropriate, entertaining the objections of the applicant's lawyers.Leaving what the applicant's counsel referred to as the "*Logan* point" aside there is no suggestion that the learned District Judge did anything other than process this matter appropriately.

23. A second argument was advanced on delay on the part of the applicant in not moving with sufficient celerity.It was argued that the applicant should have commenced judicial review proceedings when it became clear that the Director was intent on prosecuting by way of indictment.I am not satisfied that any case of delay had been made out here.After the Director's intentions were made

clear the applicant's lawyers very properly engaged in seeking to challenge the prosecution.This process carried on up to at least 5th January, 2001, when the District Judge gave his findings.It should be noted that at no stage had there been what one might have termed a full frontal assault on the charges having regard to the decision in *D.P.P.v.Logan* which, although not finding favour with me, was certainly an argument there for the making.Given the correspondence which came to light during the course of proceedings between the parties the applicant's solicitor could not have known with any certainty when the decision to prosecute by way of indictment had been made.Thus, Ground 12 of the Statement of Grounds, namely that the second named respondent did not institute the prosecution within the required time period, is, in the words of Mr.O'Reilly S.C.the "Logan point" pleaded in inchoate form.

24. I think it was appropriate that the applicant's lawyers conclude the legal argument phase, if I may so describe it, before the District Court and prior to the return for trial before commencing the judicial review application herein.No final decision had been made by the District Judge.The applicant's lawyers were absolutely entitled to be heard in their client's interest.In all the circumstances, they moved with reasonable dispatch once proceedings were finally referred to the Circuit Court.I would not refuse relief here on the grounds of delay.I would, however, for the reasons stated above, refuse all of the reliefs sought by the applicant.