Neutral Citation Number: [2009] IEHC 203

THE HIGH COURT

JUDICIAL REVIEW

2008 1160 JR

BETWEEN

WARREN HIGGINS

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of O'Neill J. delivered on the 1st day of May, 2009

The applicant, by order of this court of 20th October, 2008 (Peart J.) was given leave to pursue the following relief by way of judicial review.

> 1. An order of prohibition and/or injunction preventing the respondent, its servants or agents from taking steps in respect of criminal proceedings against the applicant entitled *The Director of Public Prosecutions (Garda Paul Aherne) v. Warren Higgins* in respect of a charge of assault contrary to s. 4 of the Non-Fatal Offences Against the Person Act 1997, on foot of charge sheet No. 803411.

The facts

On 23rd June, 2008, a youth, Daniel O'Shea, was attacked by the applicant with a bottle, as a result of which he suffered a very serious injury to his left eye, resulting in the loss of sight in that eye. This assault took place on wasteground known as "*Patch Field*" in the Onslow Gardens area of Fairhill, Cork City.

The applicant was arrested in relation to this incident on 2nd July, 2008, and was charged with the offence of assaulting Daniel O'Shea causing him harm, contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997 (the Act of 1997).

On 29th July, 2008, the respondent directed that he did not wish to commence a prosecution under s. 4 of the Act of 1997, without medical evidence. Pending the obtaining of this, he consented to the applicant being returned for trial on the section 3 charge.

On 6th August, 2008, pursuant to s. 13(2) of the Criminal Procedure Act 1967 (the Act of 1967), the applicant signed a plea to the s. 3 charge in the District Court and was sent forward for sentencing to the Circuit Court. The respondent, as required, by s. 13 (2)(a) of the Act of 1967, consented to the applicant being sent forward for sentence, on foot of his signed plea.

On 7th August, 2008, the solicitor for the applicant sought copies of statements in order to prepare a plea in mitigation.

On 8th August, 2008, the gardaí forwarded a report dated 23rd July, 2008, from Dr. Aidan Murray, a consultant ophthalmic surgeon, to Mr. Edward J.P. Hanlon, Assistant State Solicitor for Cork City. This was received by him on 11th August, 2008, and was forwarded by him to the respondent. In this report, Dr. Murray stated that the victim's left eye would be blind and, in all likelihood, would have to be removed in the future. This report was received by the respondent on 13th August, 2008. A further report was received from Dr. Iomhar O'Sullivan, a consultant in emergency medicine, by Mr. O'Hanlon on 19th August, 2008, which was forwarded to the respondent on 20th August, 2008. This report concluded that the injuries suffered by the victim amounted to serious harm but that the ophthalmologist would be able to provide a more accurate prognosis regarding the sight in the left eye.

On 21st August, 2008, the respondent directed that a prosecution be brought under s. 4 of the Act of 1997, and he consented to return for trial on that charge and the applicant being sent forward on a signed plea on that charge, should that arise. The respondent's direction in this regard indicated that the applicant's solicitor should be written to and informed of the applicant's right to resile from his plea to the s. 3 charge and that if the applicant did resile from this plea, then the jury would not be aware of same and the plea would not feature at his future trial. The report from Dr. O'Sullivan was received by the respondent's office on 21st August, 2008, and was not before the professional officer when he made the decision on 21st August, 2008, directing a s. 4 prosecution.

Towards the end of August 2008, the gardaí informed the applicant of the intention to bring a s. 4 charge.

On 24th September, 2008, the applicant was charged with the s. 4 offence and was remanded in custody for service of the book of evidence. By letter of 24th September, 2008, the applicant was written to by the State Solicitor and told that the D.P.P. would be proceeding with the s. 4 charge *in lieu* of the s. 3 charge and that the applicant was entitled to resile from his signed plea to the s. 3 charge.

On 1st October, 2008, the book of evidence for the s. 4 charge was served. By letters of 3rd and 16th October, 2008, the solicitor for the applicant indicated to the respondent that it was the applicant's intention to seek to restrain further prosecution of the s. 4 charge, and on 20th October, 2008, the applicant sought and obtained the leave of this court to bring these judicial review proceedings.

The issue that falls for determination in this case is whether the respondent, having, pursuant to s. 13 (2)(a), consented to the applicant being sent forward to the Circuit Court on foot of a signed plea, can he now prosecute the applicant on the s. 4 charge, or is he estopped from so doing, or is the applicant entitled to avail of the special plea of *autrefois convict* by reason of the fact that pursuant to s. 10 (5) of the Criminal Law Act 1997, he is to be dealt with in all respects as if he was convicted on indictment of the

offence by that court.

The statutory provisions relevant to the issues of the case are as follows:

Non-Fatal Offence Against the Person Act 1997
Section 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) . . .*
>
> *(b) On conviction on indictment to a fine or to imprisonment for a term not exceeding five years or to both."*

Section 4

> *"(1) A person who intentionally or recklessly causes serious harm to another shall be guilty of an offence.*
>
> *(2) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or to imprisonment for life or to both."*

The Criminal Procedure Act 1967
Section 13:

> *"(2) If, at any time, the District Court ascertains a person charged with an offence to which the section applies, wishes to plead guilty and the court is satisfied that he understands the nature of the offence and the facts alleged, the court may-*
>
> *(a) with the consent of the prosecutor, deal with the offence summarily . . . or*
>
> *(b) if the accused signs a plea of guilty, send him forward for sentence with that plea to a court to which, but for that plea, he would have been sent forward for trial . . ."*

Section 13 (2)(a):

> *"The accused shall not be sent forward for sentence under this section without the consent of the prosecutor."*

Section 13 (4)(a) of the Act of 1967:

> *"When a person is sent forward for sentence under this section he may withdraw his written plea and plead not guilty to the charge."*

Section 13 (4)(b) as substituted by s. 10 (4) of the Criminal Justice Act 1999:

> *"(i) The court shall enter a plea of not guilty, which shall have the same effect in all respects as if the accused had been sent forward for trial to that court on that charge in accordance with Part 1A,*
>
> *(ii) the prosecutor shall cause to be served on the accused any documents that under section 4B or 4C are required to be served and have not already been served."*

Section 10 (5) of the Criminal Law Act 1997:

> *"(5) A person sent forward to a court for sentence under section 13 (2) of the Criminal Procedure Act 1967, with a plea of guilty may be dealt with in all respects as if he or she had been convicted on indictment of that offence by that court."*

It is well settled that the respondent, as the officer of the State with the sole responsibility for determining whether or not prosecutions are to be brought on behalf of the people, enjoys a broad immunity from review by this court of decisions taken to prosecute or not to prosecute, the courts only interfering when it is established that a decision is actuated by *mala fides*.

I am satisfied that if this broad range of discretion or immunity were to be cut down, it would require express statutory provision. It is quite clear that none of the enactments in issue in this case contain any such express provision. Nor, in my view, can it be said that the provisions of the Act of 1967, in relation to the sending forward on a signed plea of guilty in respect of a charge under s. 3, and, in particular, giving of consent to that by the respondent pursuant to s. 13 (2)(a), gives rise to the necessary implication that the respondent is prevented from commencing a prosecution in respect of a charge under s. 4 in respect of the same criminal conduct.

The procedure involved in the sending forward on a signed plea is not an irreversible process. So far as the accused person is concerned in this case, the applicant, pursuant to s. 13 (4)(a) of the Act of 1967, the written plea can be withdrawn and a not guilty plea entered to the charge. On the other side, the respondent, at all times, including before the indictment procedure commences, can enter a *nolle prosequi* in respect of the charge, notwithstanding the written plea.

Neither was there any representation, by either words or conduct, on the part of the respondent to the effect that a s. 4 prosecution would not be commenced.

Even if there had been, in my opinion, having regard to the general right of the respondent to decide whether or not to prosecute, it is doubtful that such a representation could give rise to an estoppel, in the absence of *mala fides*, restraining the respondent from initiating a prosecution.

In all the circumstances of this case, I am quite satisfied that, notwithstanding the consent of the respondent pursuant to s. 13(2)(a) of the Act of 1967, the respondent was, nonetheless, entitled to commence a prosecution under s. 4 of the Act of 1997, as he did.

The next question which arises is whether or not the applicant is entitled to defend the prosecution on the basis of the special plea of *autrefois convict.*

Relying upon s. 10 (5) of the Criminal Law Act 1997, the applicant submits that as a person who has been sent forward on foot of a signed guilty plea, he is to be treated as if he had been convicted by the court.

In *Richards v. The Queen* [1993] A.C. 217, a Privy Council case, having extensively reviewed the authorities on the topic of *autrefois* convict, Lord Bridge said the following at p. 226:

> *"The need for finality of adjudication by the court whose decision is relied on to found a plea of autrefois convict is even more clearly apparent when a defendant has pleaded guilty. Not only may the defendant be permitted in the discretion of the court to change that plea at any time before sentence, but, when a plea of guilty to a lesser offence, and that charge has initially been accepted by the prosecutor with the approval of the court, there can, it appears to their Lordships, be no finality in that 'acceptance' until sentence is passed.*
>
> *In Reg. v Emmanuel [1981] 74 Cr. App. R.135, where the defendant was charged in the indictment with alternative counts, the Judge approved a proposal by the prosecutor to offer no evidence on the more serious charge and to accept a plea of guilty to the less serious. But, on hearing the facts opened, he changed his mind and withdrew his approval. The defendant was rearraigned and the trial proceeded on both counts. The defendant was convicted of the more serious offence. On appeal, it was held that three had been no material irregularity in the proceeding. Their Lordships considered that this case was rightly decided."*

I am persuaded that, for the purposes of setting up the special plea of *autrefois convict*, it is necessary that there be a final determination in the first criminal proceeding, which necessarily means that not only must there be a conviction by the jury or Judge, as the case may be, but also sentence must be passed. I am quite satisfied that the special plea cannot arise from proceedings within the same criminal justice process.

The purpose of the rule was succinctly stated by Macken J. in the case of *D.P.P. v. Alan Finnamore* [2008] IECCA 99, where she says:

> *"It seems clear from the case law that the primary purpose of the rule against double jeopardy, despite its complications, is to protect persons from being punished more than once for the same offence . . ."*

Thus, the rule is there to prevent multiple prosecutions for the same offence rather than multiple charges in respect of the same offence where, as can occur, for example, in drugs offences, the same conduct can support a number of charges.

In this case, the applicant has not yet been sentenced on the s. 3 charge. That being so, there is lacking an essential ingredient to set up the special plea of *autrefois convict*. As the applicant refuses to resile from this plea, the Circuit Court will have to determine whether to proceed with a sentencing hearing and to pass sentence or to postpone sentencing until the s. 4 charge has been tried and determined. Because the applicant refused to resile from his plea to the s. 3 charge, it was necessary for the respondent to charge the applicant with the s. 4 offence, and bring him before the District Court whereupon he was remanded in custody on that charge. This happened on 24th September, 2008. It is the respondent's intention, as deposed to on affidavit that the charges against the applicant arising out of this incident will be disposed of in a single unitary trial. I accept that this is what will occur, notwithstanding potential procedural difficulties resulting from the applicant's insistence on proceeding to a sentencing hearing on foot of his signed plea in respect of the s. 3 charge.

Having regard to the fact that a respondent can enter a *nolle prosequi* in respect of the s. 3 charge, notwithstanding the applicant's signed plea, the respondent is in a position to ensure that there will be a single trial in respect of the charges emerging from this assault incident. In the event that the Circuit Court decided to postpone the sentencing hearing on foot of the s. 3 plea until after the trial in respect of the s. 4 charge, clearly, the applicant would not be prejudiced, regardless of the outcome of that trial. If found guilty, the sentencing on both charges could proceed together, and if acquitted on the s. 4 charge, sentencing on the s. 3 plea could then proceed as if there had been no s. 4 charge.

Should the Circuit Court decide to proceed with the sentencing hearing on the s. 3 plea in advance of the trial on the s. 4 charge and, in due course, if found guilty on the s. 4 charge, the applicant would undoubtedly be given credit for whatever sentence was imposed in respect of the s. 3 charge.

If the Circuit Court decides to proceed with the sentencing hearing on the s 3. charge before the trial on the s. 4 charge, because the criminal procedure in respect of the s. 4 charge is in being, it cannot be said that the applicant has already suffered a completed criminal process resulting in the imposition of a penalty on him, thereby enabling him to invoke the special plea of *autrefois convict*.

The procedural complexity resulting from the applicant's insistence on proceeding to a sentencing hearing on the s. 3 charge cannot, in my view, give the applicant of the benefit of the *autrefois convict* rule where the criminal process in respect of the s. 4 charge was commenced before the imposition of a sentence on the signed plea in respect of the s. 3 charge. The persistence with the signed plea necessitated a procedural fracturing between the two charges, but of a temporary nature. In due course, a single trial will ensue. In my view, for the purposes of the *autrefois convict* rule, these separate procedures are properly to be regarded, having regard to their essentially contemporaneous nature, as a single criminal process.

I have come to the conclusion, therefore, that the applicant is not entitled to avail of the protection of the *autrefois convict* rule.

Accordingly, I must refuse the reliefs sought in these proceedings.