Neutral Citation Number: [2006] IEHC 181

THE HIGH COURT

2005 No. 1169 SS

IN THE MATTER OF SECTION 52(1) OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961 (No. 39 of 1961)

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA KIERAN D. MURPHY)

PROSECUTOR

AND

GARY GREGG (A MINOR)

DEFENDANT

Judgment of Mr. Justice John MacMenamin dated the 13th day of January, 2006.

1. This is a case stated by District Judge Mary Collins the Judge of the District Court assigned to the Dublin Metropolitan District, sitting at the Children's Court in Smithfield in the County and City of Dublin pursuant to the provisions of s. 52 of the Courts (Supplemental Provisions) Act 1961, for the determination of the High Court.

2. The defendant herein appeared before the Children's Court (District Court No. 55) Smithfield on 24th February, 2005 in respect of Shankhill Charge Sheet No. 357171 which alleged an offence contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001, and Shankhill Charge Sheet No. 357172 which alleged an offence contrary to s. 3 of the Non Fatal Offences Against the Person Act 1997.

Evidence of arrest charge and caution was given in respect of the alleged offences set out in the aforementioned charge sheets before the presiding judge, District Judge Hugh O'Donnell. It was indicated by the prosecution that the Director of Public Prosecutions was consenting to summary disposal of the alleged offences, but that it was for the presiding District Judge, pursuant to s. 75 of the Children Act 2001, to consider whether or not to accept jurisdiction. Having considered a summary of the alleged facts, District Judge O'Donnell accepted jurisdiction. The defendant was then admitted to bail and the proceedings were remanded to the 23rd May, 2005.

3. On that date the defendant appeared before the Childrens Court, District Judge Cormac Dunne presiding. It was indicated by Ms. Sarah Molloy Solicitor for the defendant that the defendant wished to raise legal argument in respect of the charges before the court. Upon instructions Ms. Molloy consented to remand on 3rd May, 2005 to allow the chief prosecution solicitor to take instructions and to be present.

4. On 3rd May, 2005 the accused elected for summary disposal and, legal argument proceeded before District Judge Collins. Prior to the same commencing an application to withdraw Charge Sheet No. 357172 was made by Mr. Ronan O'Neill solicitor appearing on behalf of the Director of Public Prosecutions. District Judge Collins acceded to this application.

5. Ms. Molloy applied for the proceedings to be assessed on the basis that the complaint on which the extant summons was brought had been initiated outside of the six month time limit laid down for offences of this category. She sought to distinguish the judgment of Macken J. in the case of the *Director of Public Prosecutions (at the suit of Garda Eamonn O'Brien) v. John Timmons* dated 21st December, 2004. The solicitor for the defendant submitted that in Timmons case the defence did not contest the prosecution's appeal by way of case stated in the High Court because the District Court had dismissed the case before either the District Judge had accepted jurisdiction, or the accused had been put on his election. Ms. Molloy relied on the provisions of s. 10 (4) of the Petty Sessions (Ireland) Act 1851; the provisions of the Criminal Justice Act 1951 and in particular sections 2, 7 and schedule 1 thereof, the Criminal Justice (Theft and Fraud Offences) Act 2001; the terms of the Criminal Justice Bill 2004, in particular s. 24 and the explanatory memorandum thereof; and the decisions of the Supreme Court in the cases *of S. v. The Director of Public Prosecutions and Judge Michael Connellan* (Unreported judgment of Ms. Justice Catherine McGuiness delivered 19th December, 2003) and *Director of Public Prosecutions v. Logan* [1994] 2 ILRM 229. In the event that the learned District Judge refused the defendant's application she was asked by Ms. Molloy to consider referring a case to the High Court for its opinion on the questions of law arising.

6. Mr. Ronan O'Neill Solicitor on behalf of the Director of Public Prosecutions resisted the defendants application, his submissions being based primarily on the then unreported judgment of Macken J. in the case of *The Director of Public Prosecutions (at the suit of Garda Eamonn O'Brien) v. John Timmons* dated 21st December, 2004 (now reported or [2004] 4 I.R. at p. 545). Mr. O'Neill submitted that s. 53 of the Criminal Justice (Theft and Fraud) Act had in effect created a new category of indictable offence, that is one different to a scheduled offence. Having heard submissions the learned District Judge put the proceedings back to 5th May, 2005 to allow her further time to consider the matter.

7. On 5th May, 2005 the learned District Judge indicated that she was refusing the defence application to have Shankhill Charge Sheet No. 357171 dismissed on the grounds that the complaint was 'time barred'. She did so on the basis that she felt bound by the judgment of the High Court as expressed *in The Director of Public Prosecutions (at the suit of Garda Eamonn O'Brien) v. John Timmons*. While submissions were made by Mr. O'Neill on behalf of the Director of Public Prosecutions that there was no need for a further consultative case stated, the learned District Justice acceded to the defence application for such a case to be stated after considering the particular circumstances of the instant case. The question for the determination of this court as stated in the case stated is as follows

> 'Does the six month time limit for the initiation of proceedings set down in s. 10(4) of the Petty Sessions (Ireland) Act 1851 apply to a complaint in respect of an indictable offence contrary to the provisions of the Criminal Justice (Theft and Fraud Offences) Act 2001 which is fit to be tried summarily, the conditions precedent for such summary trial in s. 53 of said Act having been complied with, and where said offences are not scheduled offences within the meaning of s. 2 of the Criminal Justice Act 1951?'

8. The issue of the application of the six month time limit prescribed under s. 10(4) of the Petty Sessions Act 1851 to indictable offences triable in the District Court has been the subject matter of some considerable discussion in earlier authorities. In order to put the matter in its context it is necessary first to consider the legislative framework which arises in this case.

9. Under s. 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001 there is created what on its face is an indictable offence entitled 'robbery'. The section provides:

> "(1) A person is guilty of robbery if he or she steals, and immediately before or at the time of doing so, and in order to do so, uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force".

(2) A person guilty of robbery is liable on conviction on indictment to imprisonment for life."

Under s. 53 of the same Act it is provided

"(1) The District Court may try summarily a person charged with an indictable offence under this Act if –

(a) the court is of opinion that the facts proved or alleged constitute a minor offence fit to be tried summarily,

(b) the accused on being informed by the court of his or her right to be tried by the jury does not object to being tried summarily, and

(c) the Director of Public Prosecutions consents to the accused being tried summarily for the offence.

(2) On conviction by the District Court for an indictable offence tried summarily under subs. (1) the accused should be liable to a fine not exceeding £1,500 or imprisonment for a term not exceeding 12 months or both for such fine and imprisonment.

10. It is pointed out on behalf of the prosecutor that it is unclear whether s. 53 of the Act of 2001 is of direct relevance to what actually occurred in the present case. Section 53 permits a person who is charged with an indictable offence under the Act of 2001 to have that offence dealt with by the court in a summary manner provided that certain conditions are met. However a child has the benefit of s. 75 of the Children Act 2001 which allows a child charged with an indictable offence to have that offence tried in a summary manner. It appears to be actually s. 75 of the Children Act 2001 which was invoked in the present case so as to give the District Court jurisdiction and it is therefore not clear that s. 53 has any direct relevance.

11. Section 75(1) of the Children Act provides that

"Subject to subs. (3), the court may deal summarily with a child charged with any indictable offence other than an offence which is required to be tried by Central Criminal Court or manslaughter, unless the court is of opinion that the offence does not constitute a minor offence fit to be tried summarily or, where a child wishes to plead guilty, to be dealt with summarily".

12. The jurisdiction under the Children Act 2001 is not limited to particular offences such as those scheduled under the Criminal Justice Act 1951 but extends to all indictable offences save those to be tried by the Central Criminal Court, or manslaughter. Section 75 of the Children Act does not contain any stipulation as to a six month time limit on the commencement of the prosecution of offences. On behalf of the prosecutor Mr. Paul Anthony McDermott B.L. submitted that any such time limit would be absurd since it would mean that a child charged with an indictable offence such as robbery within five months of the incident could be dealt by the Children's Court whereas a child charged with the same offence after seven months of the incident would have to face the Circuit Criminal Court. Such a consequence could work on unfairness on the accused and would be entirely arbitrary in effect.

13. Counsel added that in order for s. 75 to apply, the accused must consent, and the court must be satisfied that it is a minor offence fit to be tried summarily. The main difference between s. 75 and other provisions which allow indictable offences to be tried summarily is that the consent of the Director of Public Prosecutions does not appear to be required so as to allow this section to operate. Furthermore, it is submitted that a further innovative feature of s. 75 is that it applies to all indictable offences rather than a list of those specified in a schedule to the Act.

One can immediately state the obvious in this case. There is one matter in this issue where there can be no controversy. The offence created by s. 14 of the Act of 2001 creates an indictable offence entitled 'robbery' and on the authorities cited below the offence does not lose its characterisation as an indictable offence by virtue of the charge being preferred in the District Court and, subject to the conditions outlined earlier, the matter being dealt with in that court.

14. S. 10(4) of the Petty Sessions (Ireland) Act 1851 sets down a six month time limit for various matters. It provides

"In all cases of summary jurisdiction the complaints shall be made … in any other case within six months from the time when the cause of complaint shall have arisen but not otherwise".

15. Section 9 of the Statue of Limitations 1957 provides that s. 10(4) of the Act of 1851 is repealed "save insofar as it relates to summary proceedings of a criminal nature in the District Court".

16. The question at issue here however is whether s. 10(4) of the Act of 1851 has any application to s. 53 of the Act of 2001. Mr. McDermott submits that s. 53 is a self contained section dealing with indictable offences which have no time limit, and which simply provides a mechanism whereby such offences can be dealt with in the District Court. Counsel submits that it would make no sense in logic for a six month time limit to apply to an offence of robbery contrary to s. 14 of the Act of 2001 since at the time of charging there is no reason to believe it will be dealt with other than on indictment. It is only when the three conditions laid down in s. 53(1) of the Criminal Justice (Theft and Fraud Offences) Act 2001 are met, or if the conditions laid down in s .75 of the Children Act 2001 are met, that it can be tried in the District Court. However counsel submits, by definition one would not know if these three conditions would be met at the time of charging. Thus the only way in which a prosecutor can be sure of initiating his complaint within time would be to prosecute every single offence under the Act of 2001 within six months lest it later transpire that it should be dealt with in a summary manner.

17. Counsel submits that, while in some cases the Director of Public Prosecutions may have decided on whether a matter is to be prosecuted on indictment or in a summary manner before charging, in other instances the decision may not be made until later, and may depend on factors such as the manner in which the accused is indicated he will be pleading. In any event the attitude of the Director of Public Prosecutions is only one of three factors set out in s. 53, and thus will not be dispositive of in which jurisdiction the charge will ultimately. It is contended that what the accused is seeking to do is to "read into" s. 53 of the Act of 2001 a time limit that does not appear in that section, or indeed anywhere else in the Act. The fact that an indictable offence may be tried in a summary manner does not mean that it must be subject to the time limits applicable to summary offences. The general principle is that there is no time limit on the prosecution of indictable offences. Nothing in s. 53 suggests that the Oireachtas intended to alter this merely because it was providing for a method by which such indictable offences could be tried in the District Court.

18. It is clear that the general principle is that there is no time limit for indictable offences. Under s. 7 of the Criminal Justice Act 1951

it is provided:

> "Paragraph 4 (which prescribes time limits for the making of complaints in cases of summary jurisdiction) of s. 10 of the Petty Sessions (Ireland) Act 1851 shall not apply to a complaint in respect of an indictable offence". Robbery contrary to s. 14 of the Act is an indictable offence and so it is contended no time limit applies.

19. Counsel for the Director submitted that the other main provision contained in the Act of 1951 was that it set up a mechanism under s. 2 of that Act for the summary trial of indictable offences. Section 2(1) of that Act provided that it was to apply for the offences set out in the first schedule of that Act. Section 2(1) has now been substituted by s. 8 of the Criminal Justice (Miscellaneous Provisions) Act 1997 and provides that

> "The District Court may try summarily a person charged with a scheduled offence if –
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> (a) the court is of opinion that the facts proved are alleged to constitute a minor offence fit to be tried summarily,
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> (b) the accused on being informed by the court of his right to be tried with the jury does not object to being tried summarily, and
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> (c) the Director of Public Prosecutions consents to the accused being tried summarily for such offence".

20. No offences under the Act of 2001 are "scheduled". Rather s. 53 of the Act of 2001 effectively repeals what is in s. 2(2) of the Act of 1951. In fact as the categories of offences which remain scheduled under the Act of 1951 have been attenuated on a consistent basis by way of legislation.

21. One turns then to the submissions made succinctly by Mr. Michael O'Higgins S.C. He submits that the "time when the cause of complaint shall have arisen" is recited in the relevant Shankhill Charge Sheet No. 357172, that is to say the 13th June, 2004. The actual complaint in respect of the alleged offence was not made however until over eight months later, namely 24th February, 2005 when evidence of arrest, charge and caution was given by an Garda Siochana before the District Court.

22. Considerable reliance was placed by Mr. O'Higgins S.C. on the authority of *the Director of Public Prosecutions v. William Logan* [1994] 2 ILRM at p. 229.

23. It will be of assistance to pause and consider the specific facts which arose in *Logan*. The defendant was charged in the District Court with the offences of assault contrary to common law, s. 42 of the Act of 1861, and s. 11 of the Act of 1951. Under s. 42 of the Offences Against the Person Act 1861 as amended by s. 11 of the Criminal Justice Act 1951 a charge of assault contrary to common law could be prosecuted summarily. Section 46 of the Act of 1861 provides that if an assault or battery complained of was accompanied by an attempt to commit a felony, or the District Court was of the opinion that it was a fit subject for a prosecution on indictment, that Court should abstain from adjudicating upon it. Section 47 of the 1861 Act provides that a person convicted on indictment in respect of a common assault might be imprisoned for a period not exceeding one year.

Section 7 of the Criminal Justice Act 1951 provides that

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

24. The District Judge in *Logan* dismissed the charges on the ground that the application for the issue of a summons had not been made within the period of six months from the date of the alleged offence in circumstances where the prosecution had decided to deal with the charge summarily. In the High Court on foot of a case stated it was held that as an assault at common law he could be prosecuted on indictment, it was an indictable offence, and thus s. 7 of the 1951 Act applied. This meant that the six month period laid down by s. 10(4) of the 1851 Act did not apply and the District Judge had been incorrect in dismissing the charges. The defendant appealed. In reversing the decision of the High Court the Supreme Court held that the phrase "complaint in respect of an indictable offence" in s. 7 of the 1951 Act referred to a complaint in respect of an indictable offence which was a scheduled offence as defined by s. 2 of the 1951 Act, and could be tried summarily by the District Court under s. 2(2), provided that the conditions set out in that subsection were satisfied. The court further considered that, as s. 7 provides that s. 10(4) of the 1851 Act shall not apply, it had to deal with a situation in which s. 10(4) would otherwise apply or otherwise might apply. Hence, it could only be dealing with a complaint in respect of an indictable offence which the District Court had jurisdiction to try summarily under s. 2(2) of the 1951 Act. The court concluded that the offence of assault contrary to common law was not a scheduled offence within the meaning of s. 2 of the 1951 Act. It was a common law offence which might be prosecuted summarily under s. 42 of the 1861 Act, or tried on indictment under s. 47 of the 1861 Act. Accordingly, s. 7 of the Act of 1951 did not apply to prosecutions under s. 42 of the 1861 Act for assault contrary to common law. A previous decision of Barron J. *McGrail v. Ruane* [1989] ILRM 498 was overruled. Furthermore as a matter of construction, the court considered that the words "complaint in respect of an indictable offence" in s. 7 were capable of a reasonable and sensible application because they clearly referred to a complaint of an indictable offence set out in the first schedule to the 1951 Act. The words were capable of this meaning without having to be extended in any way. There was no need to extend them to the offence of 'assault contrary to common law triable summarily' under the 1861 Act because that offence also happened to be triable on indictment under s. 47 of the 1861 Act. There was no reason to extend the words to provide that s. 10(4) of the 1851 Act should no longer apply to a prosecution under s. 42. In the course of the judgment of the court Blayney J. stated at p. 235 of the report:

> "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 and may be tried summarily by the District Court under s. 2(2) provided that the conditions set out in that subsection are satisfied. Since the section provides that paragraph 4 of s. 10 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(2) and the probability is that the draftsman of the section took the view that paragraph 4 of s. 10 of the 1851 Act would apply by reason of the decision of the Supreme Court in *Attorney General v. Conlon* 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 the section must mean an indictable offence which is a scheduled offence under s. 2 and which the District Court has jurisdiction to try summarily under the same section". Blayney J. added:

> "The offence of assault contrary to common law is not such an offence.
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> It is not one of the scheduled offences under s. 2.
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> It is a common law offence which may be prosecuted summarily under s. 42 of the Act or tried on indictment under s. 47 of the same Act".

25. Blayney J. added at "this is set out very clearly by Finlay C.J. in his judgment delivered as President of the High Court in the case of the *Attorney General (O'Connor v. O'Reilly)* in which he said at p. 5

> "Section 42 of the Offences Against the Person Act 1861 did not create an offence. No words making an assault an offence or stating that a person who shall commit an assault shall be guilty of an offence are to be found in the section and what the section clearly and only does in my view is to provide a method of prosecuting a pre-existing offence to wit an assault contrary to common law. In so doing the legislature under s. 42 provided that where an offence was in fact prosecuted in a summary manner under that section that the limit of penalty shall be two months imprisonment. Section 47 of the same Act however clearly recognises the possibility of an alternative method of proper An alternative method of prosecuting a charge of common assault are as it is more correctly to be termed assault contrary to common law by indictment for by that section a maximum penalty of one years imprisonment for such offence is provided"

26. However as is pointed out by Macken J. in the course of her judgment in the case of the *Director of Public Prosecutions (O'Brien) v. Timmons* [2004] 4 IR the position in *Logan* was an unusual one. At p. 550 of her judgment Macken J. explained:

> "The Case Stated which she was considering in Timmons makes it clear that the argument on behalf of the respondent in the District Court relied on the decision in *Director of Public Prosecutions v. Logan* (1994) 3 IR 254. I do not think that case is of assistance to the respondent. It concerned the terms of Section 7 of the Act of 1951, the Supreme Court holding that "the term 'indictable offence' in the 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."

27. Macken J. added:

However to appreciate this extract it has to be understood that *Director of Public Prosecutions v. Logan* [1994] 3 IR 254 was a decision in a particular and perhaps peculiar context. The case concerned an assault. The facts giving rise to the charge could have led to a summary prosecution under s. 42 of the Offences Against the Person Act, 1861 or they could have led to a charge on indictment under s. 47 of the same Act. The accused had been charged with an assault contrary to common law under s. 42 of the Act. The charges were dismissed on the grounds that a period of more than six months had elapsed between the date of the alleged summary offence and the issue of the summons. The director of public prosecutions had argued that, although the nature of the offence did not change by reason of the manner in which it was prosecuted, nevertheless where the offence was one which was capable of being tried on indictment, it was an 'indictable offence' for the purpose of s. 7 of the Act of 1951. That being so, there was no time for the issuing of the summons."

28. Macken J. continued:

> "This argument was rejected by the Supreme Court which held that a prosecution for an assault contrary to common law under S. 42 of the Act of 1861 is not a 'complaint in respect of an indictable offence' for the purposes of S. 7 of the Act of 1951 and therefore the charge must be initiated within six months from the date of the alleged offence having been committed, as required by S. 10(4) of the Petty Sessions Act of 1851."

The judge added:

> "I do not consider that case to be relevant to the matters at issue here, because the District Court in this case was not dealing with facts which might have constituted either a summary offence or an indictable offence. It was simply dealing with an indictable offence capable of being tried summarily provided certain conditions were met."

29. Macken J. concluded:

> "Having regard to the foregoing it seems to me that the real question to be decided is whether an indictable offence (in this case one under S. 18 of the Criminal Justice [Theft and Fraud Offences] Act of 2001) capable of being tried summarily pursuant to S. 53 of that Act losses its classification as an indictable offence and becomes, provided the requirements of that section are met, a summary offence, and therefore subject to the time limits provided for S. 10(4) of the Petty Sessions (Ireland) Act, 1851. I do not think that it losses its classification as an indictable offence nor that it becomes a summary offence merely because it can be tried summarily."

30. In the course of her judgment Macken J. referred to the decision of the Supreme Court in the *T.D.I. Metro Ltd v. Delap (No. 2)* [2000] 4 IR 520, at 529, where it was the majority decision was that, while it was not the central issue an indictable offence, even one which may be tried summarily, should be treated as retaining its character as an indictable offence. Hardiman J. while dissenting from the majority of the Court on the outcome of the case itself, stated at p. 527 summarised the issue thus:

> "Once a complaint is made in respect of an indictable offence, the offence retains the character of an indictable offence even after (if that occurs) the conditions for summary disposal are met: see *Attorney-General v. Conlon* [1937] I.R. 762. Indeed, in *Director of Public Prosecutions v. Logan* [1994] 3 I.R. 254 the Director of Public Prosecutions himself submitted, as recorded, in the judgment of Blayney J. at p. 260:
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> > "[T]hat the nature of the offence did not change by reason of the manner in which it was prosecuted. This was an offence which was capable of being tried on indictment and accordingly it will be an indictable offence for the purposes of S. 7 [of the Criminal Justice Act 1951]"

31. And further, at p. 529:

> "I consider that the authorities already cited establish that an indictable offence retains its character as such even if it is in fact dealt with summarily. Secondly, I consider it important that the form of the statute in this case establishes three preconditions to the indictable offence being dealt with summarily, but none to its being dealt with on indictment. In other

words, it would be dealt with on indictment unless the preconditions are met."

32. In the light of these observations Macken J. concluded in Timmons that an offence which was indictable but which may be disposed of in a summary manner such as the offence in the case stated, at all times retains its character and classification as an indictable offence even when the conditions upon which disposing it on a summary basis are met and where the time limit of six months provided for in legislation applicable in summary offences does not apply.

33. Further reliance is placed by Mr. O'Higgins, Senior Counsel, on the decision of the Supreme Court in the case of *S. v. Director of Public Prosecutions and Judge Michael Connellan* (Unreported Judgement delivered the 19th of December, 2000).

34. In the course of her judgment on behalf of the court in S. McGuinness J. stated at p. 13

> "The question of whether the six month time limit of the Act of 1851 applied to the summary trial of an indictable offence specified in s. 77(b) of the Courts of Justice Act, 1924 was considered by the former Supreme Court in *the Attorney General v. Conlon* [1937] I.R. 762 and it was held that the time limit did apply to such prosecutions."

35. Counsel relies on the statement of Ms. Justice McGuinness at p. 15 of the judgment where, having "respectfully accepted the dictum of Blayney J." cited earlier in this judgment McGuinness J. continued:

> "It seems to me perfectly clear that the effect of S. 7 of the 1951 Act is to exclude the prosecution of the appellant for these alleged offences from the time limit provisions of the 1851 Act. There is no suggestion in the 1951 Act or otherwise that S. 7 of that Act does not apply in the case of indictable offences prosecuted summarily."

36. The defence submits that *Timmons* is distinguishable from the instant case for the following reasons:

> 1. In *Timmons* which concerned an appeal by way of case stated brought by the Director of Public Prosecutions a similar question to that posed herein was asked. However there is, he contends, a crucial factual difference between the two proceedings. Unlike the present case, in *Timmons* there had been an application in the District Court to dismiss the offence before the court (on this occasion an offence contrary to the provisions of S. 18 of the Criminal Justice [Theft and Fraud Offences] Act, 2001) on the grounds that the aforementioned six month time limit applied to the complaint which had been initiated approximately eight months after the alleged offence had been committed. The application for a dismissal in *Timmons* was made immediately after the consent of the Director of Public Prosecutions to summary disposal had been delivered, but before the District Judge had either considered a summary of the alleged facts so as to decide whether the facts constituted a minor offence said to be tried summarily or placed the accused on his election. Thus the application to dismiss was premature, the three necessary preconditions for summary trial not having been complied with.

37. In contra distinction, in the present case Mr. O'Higgins urges the court to accept that in the present proceedings all the necessary preconditions for summary trial have been complied with, and that *Timmons* should be limited in application to its own facts where only one step of the required three towards summary disposal had been taken. But why should this make a difference to the principle in question?

38. Counsel submits that the authority of *S. v. The Director of Public Prosecutions and Judge Michael Connellan* appears not to have been opened before Macken J. in the course of the hearing in *Timmons*. He also submits that the court would appear to have been under a misapprehension in that the authority of *McGrail v. Ruane*, referred to in the course of the judgment in Timmons was overruled in *Logan* in the Supreme Court.

39. Mr. O'Higgins also submits that the proper application of s. 53 of the Act of 2001 would not be rendered cumbersome or impossible if the six month time limit applied to indictable offences capable of being tried similarly. He submits that the Director of Public Prosecutions has a duty to direct summary trial or trial and indictment within a reasonable period of time and that any defendant has a right to trial with reasonable expedition. He refers to the authority of *Clune v. D.P.P.* [1981] ILRM 17 at p. 19 and the decision of Gannon J. in this context. I have no difficulty in accepting this proposition.

Moreover counsel submits that in many cases there would be a very real indication that proceedings would be disposed of summarily at the time of the charging and not by way of indictment. This might be because of the minor or trivial nature of the facts alleged as circumstances of the case, or by virtue of a general consent to summary disposal in respect of certain categories of cases which has emanated from the Director of Public Prosecutions. As soon as a District Judge receives the consent of the Director of Public Prosecutions on a summary disposal in respect of a charge, Mr. O'Higgins contends that a judge could then decide upon hearing a summary of the alleged facts whether to accept or to refuse jurisdiction and a defendant could then be put on his election. The process could then be concluded expeditiously.

40. Having summarised the submissions of the defendant it is necessary now to revert to the decision of the Supreme Court in *Logan*.

41. It seems to me that the fundamental distinction which exists between the facts of Logan and the instant case is that under the Offences Against the Person Act, 1861 there were two completely distinct methods of prosecuting the charge. The charge could be prosecuted from the outset as a summary matter, or could be prosecuted from the outset on indictment.

Under the Act of 2001 however, all of the offences are generically different and distinct: they are simply indictable, and therefore *prima facie* can only be prosecuted as such. It is only where all of the conditions on S. 53 have been satisfied that it will become possible to try the indictable offences in the District Court. The logic behind the decision in *Logan* was that S. 7 could only be dealing with a situation where S.10(4) of the Petty Sessions Act might *otherwise apply* and thus could only be dealing with a situation where an indictable offence was being tried summarily. One may ask why the Supreme Court in *Logan* went to the further conclusion that only offences in the Schedule of the Criminal Justice Act, 1951 are included in the phrase "indictable offence" and why it should not extend to any indictable offence which is capable of being tried similarly, even if the power to so try it does not derive from the schedule to the Criminal Justice Act, 1951. I consider the reason for this is that at the time of *Logan* the only indictable offences which could be tried in a summary manner were the ones specified in the schedule. Thus there would have been no logic in the court, at that time, defining indictable offences which may be tried summarily as applying to anything outside of that schedule.

A further distinction is that in *Logan* the Director of Public Prosecutions was constrained to argue that because the offences of assault was capable of being tried on indictment, that it was therefore to be considered as an indictable offence for the purposes of S. 7 of the Act of 1951. It was only in that context that the Supreme Court reached its conclusion. There, the Director of Public Prosecutions was prosecuting a summary offence under S. 42. The mere fact that the Director could have (but did not) bring a

prosecution on indictment under S. 47 could, it might well be said, hardly effect the applicable time limit for the summary offence under s. 42.

The position here is quite otherwise. The facts of this case concern not an offence which is *capable* of being tried on indictment if prosecuted under a distinct statutory provision, but rather an offence which is and always remains an indictable offence.

42. It seems to me that in the case of *'S'*, and in particular the quotation referred to above on p. 15 of the judgment, McGuinness J. was referring to indictable offences prosecutable summarily and did not limit her remarks to scheduled offences.

43. It has now become more frequent for the time limit for the prosecution of offences in the District Court to be defined by statute as being twelve months rather than six see e.g. Trading Stamp Act, 1980 S.14; Postal and Telecommunications Services Act, 1983, S.5; Childcare Act, 1991 S.71., National Minimum Wage Act, 2000 S.37(5), Equal Status Act, 2000 S.44(4), Electronic Commerce Act, 2002 S.6(2) and a wide variety of other instances. Indeed in some cases the time limit is even longer (see footnote No. 38 at p. 642 of Walsh 'Criminal Procedure' Thompson Roundhall Dublin 2002). In respect of certain individual offences the time limit is imposed by statute. It may also be borne in mind that excessive delay in bringing a prosecution in any individual case can amount to a breach of the constitutional rights of an accused to a fair trial. There is nothing sacrosanct per se in the six month time limitation.

44. It is appropriate finally to refer to two other relatively recent decisions of the High Court. In the case of *D.P.P. v. B.J.N. Construction* (The High Court, Peart J. 25th June, 2003) that Judge held that in the case of Prosecutions brought under the Health and Safety code time limits applied only to summary prosecutions and not to prosecutions brought on indictment, even in the District Court. At p. 4 of his judgment that Judge stated:

> "It is worth noting at this stage, that S.11 of the 1851 Act makes certain provisions, *inter alia*, for the issue of summonses in respect of indictable crimes and offences, but contains no provision as to any time limit from the date of the offence within which any such summons shall be issued."

45. It is appropriate also to mention the more recent decision *of Robinson v. Judge O'Donnell and the D.P.P.* (The High Court, Hanna J., 20th July, 2005) in which the defendant was charged with the offence of assault under S.3 of the Non Fatal Offences Against the Person Act, 1997. Section 3 of that Act provides:

> 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."

46. Thus S.3 of the Act of 1997 creates a distinct indictable offence and a distinct summary offence. In that particular it resembles *Logan*. It is unlike the Act of 2001 where *all* the offences are stated to be indictable and thereafter S.53 of that Act sets down a mechanism whereby such indictable offences may be tried in a summary manner. Again as in *Logan* the prosecution in *Robinson* chose to proceed against the defendant by way of prosecution and indictment.

Hanna J. held at p.14-15 of his judgment:

> "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… Clearly time had elapsed as far as the summary route was concerned. However, the indictable route was still open." It seems to me that this ruling does not apply in the instant case where the offence was an indictable one only.

47. Having regard to the foregoing one then must consider the overall logic of the position. To place the interpretation urged by the defendant on the section could lead to results which are both absurd or artificial. It could lead to the drawing of an arbitrary demarcation line in the prosecution of offences which might in certain circumstances actually be prejudicial to the accused and prevent the disposal of trial in the district court. The identity and characteristic of the offence created by S.14 not 'hybrid' but an indictable offence. Its character is not changed by the forum in which it is chosen to prosecute. In so concluding therefor I consider that I should follow the authority laid down by Macken J. in *Timmons* as recently as one year ago. In the circumstances I consider that the question posed by the learned District Justice should be answered "No".