

**THE HIGH COURT  
JUDICIAL REVIEW**

**2008 1256 JR**

**BETWEEN**

**DANIEL SHERRY**

**PLAINTIFF**

**AND**

**JUDGE FLANNAN BRENNAN**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENTS**

**JUDGMENT delivered by Mr. Justice McMahon on the 17th day of July, 2009**

Leave to bring proceedings by way of judicial review was granted by order of Peart J. dated 10th November, 2008. The amended statement required to ground the application for judicial review sets out the essence of the applicant's complaint.

"E. Grounds on which the said relief is sought:

1. The Order dated May 13th 2008 sending the Applicant forward for trial states *inter alia* at paragraph 1 thereof:-

'Whereas the above named accused is before the Court charged as set out on the attached book of evidence,'

2. The said Order subsequently purports to send the Applicant forward 'on the aforesaid offence(s)'

3. Whilst the said Order states that the 'book of evidence' is attached to the Order sending forward for trial, no such document or documents are attached to the said Order as it appears on the Circuit Court file. Further, it is not clear from the fact of the said order whether the Applicant has been sent forward on foot of one or more offences. The said Order is thus bad on its face and is void for uncertainty.

4. Further, the said Order does not on its face or by reference to any other documents state with any, or any sufficient particularity or certainty the charges or offences in respect of which the Applicant was purported to be sent forward.

5. A statement that the Applicant 'is charged as follows' appears at the front of the documents known as the Book of Evidence served on the Applicant as set out below:

1. That you the above named accused on the 28/06/2007 at 82 Meadow Grove, Dundalk, Co. Louth, within the Court area and District aforesaid, having entered a building known as 82 Meadow Grove, Dundalk, Co. Louth as a trespasser did commit an arrestable offence, to wit, assault causing harm therein. Contrary to Section 12(1)(b) and (3) of the Criminal Justice (Theft and Fraud Offences Act) 2001. Charge sheet number 740728.

AND:

2. That you the above named accused on the 28/06/2007 at 82 Meadow Grove, Dundalk, Co. Louth, in the said District Court Area of Dundalk, did without lawful excuse damage property, to wit, front door of 82 Meadow Grove, Dundalk, belonging to Cora Teelin Kenny, intending to damage such property or being reckless as to whether such property would be damaged. Contrary to Section 2 Criminal Damage Act 1991. Charge sheet number 740729.

6. In addition to those matters referred to in the said statement of charges, a number of other matters are disclosed in the documents known as the Book of Evidence and served pursuant to Section 4(B)1 of the 1967 Act as amended which amount to allegations of offences with which the Applicant could be charged including assault contrary to Section 2 of Non Fatal Offences against the Person Act 1997; and using threatening and abusive words or behaviour intending to cause a breach of the peace contrary to s. 6 of the Criminal Justice (Public Order) Act, 1994.

7. The said alleged offences include summary offences. It appears therefore that the said Order may have purported to send the Applicant forward for trial on a summary offence and the said order is bad and should be quashed on that ground.

8. In failing properly to particularise the charges upon which the Applicant was sent forward for trial and in furnishing him with documents specified in Section 4B(1) of the Criminal Procedure Act, 1967, as amended, which

disclose the allegations or charges or possible charges of offences other than those contained in the statement of charges, the Applicant's constitutional right to a trial in accordance with law has been breached.

9. The said Order is bad or void for uncertainty.

10. The said Order is the foundation of the jurisdiction of the Circuit Court to deal with the said prosecution.

11. The quashing of the original Order sending forward is necessary for the vindication of the Applicant's constitutionally protected rights to trial in accordance with law."

The applicant seeks an order of *certiorari* and an order staying the said prosecution pending the determination of these proceedings.

The facts were that the applicant was sent forward for trial pursuant to the Criminal Procedure Act 1967, s. 4A(1) on 13th May, 2008. On that date, the applicant was furnished with a book of documents pursuant to the provisions of s. 4B(1) of the Criminal Procedure Act 1967. A statement of charges in the documents furnished to the applicant charges one count of burglary and one count of criminal damage. On 30th October, 2008, the applicant's solicitor was furnished with a copy of the order sending forward for trial. After naming the accused and furnishing his address, the order continues:-

"Whereas the above named accused is before the court charged as set out on attached book of evidence, and whereas the Director of Public Prosecutions consents to the accused being sent forward for trial and the documents specified in s. 4B(1) of the Act have been served on the accused. And having informed the accused of the requirement of s. 20 of the Criminal Justice Act 1984, and s. 3 of the Offences Against the State (Amendment) Act 1998, I HEREBY ORDER that the accused be sent forward for trial on the aforesaid offence(s) to the present sitting of the Circuit Court at Dundalk..."

The applicant's complaint relates to the relevant part of the order returning the accused for trial which provides:-

"Whereas the above named accused is before the court charged as set out on attached book of evidence..."

Firstly, the accused argues that the book of evidence was not attached to the order when furnished and secondly, that the recital does not on its face specify in any way the charges facing the accused.

It is admitted by the accused that the first page of the book of evidence contains a statement of charges and this specifically refers to two charges; one count of burglary and one count of criminal damage.

The essence of the applicant's submission is that by referring only to the book of evidence, there is no specificity as to what he is charged with and second, insofar as the book of evidence contains not only those charges contained in the charge sheet, but also contains potential charges (including summary charges) which could be brought on the evidence contained in the witnesses statements in the book of evidence.

At the outset, I am not prepared to place any importance on the fact that the book of evidence was not physically attached to the order in the sense that it was not pinned or stapled to the order. In my view, in the context of the present case, "attached" was merely a way of referring to the book of evidence which was in existence and had been served on the accused at the relevant time. There could have been no doubt about what book of evidence was in issue or what it contained.

In situations like the present, the most important point for the court to determine is whether there was any uncertainty on the part of the accused as to what charges are being brought against him. If there is a serious uncertainty, then the court must find for the accused. Using this criteria, I must ask myself this initial question: does the order, as drafted in the circumstances of this case, create any uncertainty for the accused in knowing the charges he has to face?

It is true that the presumption of a valid return for trial is disputable, but the onus is on the accused to dispute it and prove his contention to the satisfaction of the court (*The State v. His Honour Judge M.J. Binchy and Charles Hand* [1964] 1 I.R. 395). In my view, the accused has not discharged this onus in this case.

It is to be noted that the order states that the "accused is before the court charged as set out on... book of evidence...". The only charges set out in the entire book of evidence are those contained in the charge sheet which is the first substantive page of the book of evidence served on the accused. It is normal that the charge sheet should be the first page in the book of evidence. There are no other charges in the book of evidence so there can be no ambiguity as to what "the charges" are. That there are other potential charges that could or might be brought against the accused is not relevant at this juncture. I do not accept that because there are some witness statements in the book of evidence that might possibly be interpreted as evidence of potential offences that the order could refer to these. The order refers to "charges" and not to "potential charges" and nowhere in the book of evidence is it indicated that other charges are being brought or intimated by anyone that they will be brought. There is no possible interpretation of the relevant part of the order that would extend its effect to such possible charges. A commonsense view of the order leads one to the conclusion that the only charges that the accused is sent forward on are those contained in the charge sheet itself.

Section 4B(1)(a) of the Criminal Procedure Act 1967 (as amended by s. 9 of the Criminal Justice Act 1999) obliges the prosecution to serve on the accused as part of the book of evidence, "a statement of the charges against the accused". This is a mandatory statutory provision and every book of evidence must comply with it. Such a statement of charges has been furnished to the accused in this case (and is noted on the face of the order itself) which lists two charges of burglary and criminal damage as the charges facing the accused. In these circumstances, it is reasonable to interpret the phrase in the order i.e. "...charge as set out on... book of evidence..." as meaning "...charge as set out *in the statement of charges* as set out on... book of evidence..." and I hold that is the way the order in this case should be read. It is interesting to note that the most recent version of the District Court Order Sending Forward for Trial does use this

formulation where it says, "...as set out in the statement of charges in the book of evidence".

I do not accept that in adopting this new wording, the conclusion must be drawn that the earlier wording, at issue in this case, was wrong and defective in law. The clarification in the new order merely recognises that there is the possibility that an accused will make an argument (as the accused makes here), and it is sensible, in my view, to improve the existing wording to exclude such an argument in the future. To do so is, in no way, an admission that the argument on the old draft is a valid or sustainable one.

The cases relied on by the accused as supporting his case do not do so, in my view. In the *Director of Public Prosecutions v. Riley & Ors* [2008] IEHC 419, there was a clear defect "in that the attached schedule of charges referred to in the printed form had been left blank in each case". That clearly was a case where the accused was entitled to argue that there was a failure to particularise the charges he was facing. In *Maples v. District Judge McCarthy & Anor* (referred to at para. 13 of *Director of Public Prosecutions v. Riley (Supra)*) the return for trial referred to an attached schedule of charges which had gone missing. Apparently, in that case, the Director of Public Prosecutions did not oppose certiorari but there is no written judgment in that case and in any event, the Director of Public Prosecutions may have had many other reasons other than those being suggested by the accused here, for not opposing the application. In both of those cases, the accused clearly did not have sufficient specific knowledge of the charges he was facing. In *B.H. v. Director of Public Prosecutions* [2003] 2 I.R. 43, High Court; 58 Supreme Court, the statement of charges referred to particulars of an offence committed in the United Kingdom which it was stated was "contrary to section 2 of the Sex Offences (Jurisdiction) Act 1996". As Geoghegan J. said in the Supreme Court in that case, in dismissing the Director of Public Prosecution's appeal:-

"It would seem crystal clear from any reading of that subsection that it is not purporting to create a new offence but rather to extend the jurisdiction to try certain existing offences." (At p. 59 of the Report)

It is clear from this that the statement of charges that the statutory provision cited there did not disclose any offence with which the accused could be charged. This cannot be equated with the facts in the present case.

For these reasons I refuse the applicant's application for *certiorari*.