

**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2014 No. 554 J.R.]**

**BETWEEN**

**JAMES O'MALLEY**

**APPLICANT**

**AND**

**DISTRICT JUDGE PAUL KELLY**

**RESPONDENT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**NOTICE PARTY**

**JUDGMENT of Mr. Justice McDermott delivered on 7th day of November, 2014**

1. On 15th September, 2014, the applicant was convicted of 33 offences at Letterkenny District Court. Thirty of the convictions related to offences committed in Donegal. Two related to offences committed in Dublin and one in Newbridge, County Kildare. The applicant pleaded guilty to all charges and received a number of custodial sentences ranging from five days to six months imprisonment, which included various concurrent sentences and a number of offences which were taken into consideration.

2. The three offences, which were not committed in Donegal and were initially prosecuted in Dublin, were set out on charge sheets as follows:-

(a) Fitzgibbon Street Charge Sheet No. 13702449 between Garda Sheryl Woulfe and James O'Malley alleging that the accused on 20th April, 2013, at Aldborough Court, North Strand Road, Dublin 1 in the said court area of Dublin Metropolitan District assaulted one Kamil Hael causing him harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997;

(b) Bridewell Charge Sheet No. 13800904 between Garda John P. Johnston and James O'Malley alleging that on 24th May, 2013, at Museum Luas Stop, Dublin 7, a public place in the Dublin Metropolitan District, the accused did use or engage in threatening abusive or insulting words or behaviour with intent to provoke a breach of the peace or being reckless as to whether a breach of the peace might have been occasioned contrary to s. 6 of the Criminal Justice (Public Order) Act 1994, as amended by s. 22 of the Intoxicating Liquor Act 2008, and

(c) Charge Sheet No. 14370326 between Garda Wendy Doyle and James O'Malley alleging that on 20th December 2013, at Edward Street, Newbridge, County Kildare in the District Court area of Naas, the accused provided Garda Doyle with a name and address which was false and misleading contrary to s. 24(3) and (4) of the Criminal Justice (Public Order) Act 1994, as amended by s. 22 of the Intoxicating Liquor Act 2008.

3. The applicant claims that the first named respondent lacked jurisdiction to convict and sentence him in respect of the Dublin Charge Sheets, because they were in respect of offences committed outside the Donegal District at a time when the applicant was resident in Dublin.

**Background**

4. The assault offence was committed on 20th April, 2013, following which the accused was immediately arrested and charged before Dublin District Court No. 2, sitting at the Criminal Courts of Justice, Parkgate Street, Dublin. He was remanded on bail to appear before the Dublin District Court at the same venue on 22nd April. He was further remanded to 10th June, 2013, but failed to appear. This warrant was later executed on 21st December at the Criminal Courts of Justice, Dublin when he was remanded in custody to appear at Cloverhill District Court on 27th December, 2013. On that date he was further remanded in custody with consent to bail to 24th January, 2014. Having obtained bail, he failed to appear on that date and a warrant issued for his arrest. The applicant contends, and it is accepted, that at the time of the commission of the offence he was resident in Dublin at 9 St. Aonghus Lawn, Tymon North, Tallaght, Dublin 24.

5. The applicant first appeared before Court 44 at the Bridewell Courts, Chancery Street, Dublin 7 in respect of the public order offence committed at the Museum Luas Stop on 24th May, 2013, on 25th May, and was remanded on bail to appear at Cloverhill District Court on 28th May. He was further remanded on bail to appear at the same court on 4th June. He failed to appear and a warrant issued for his arrest. This was also executed on 21st December, 2013, following which he was remanded in custody on this charge to 27th December, and thereafter in custody with consent to bail to 24th January, 2014. As in the s. 3 offence, having obtained bail, he failed to appear on 24th January and the warrant issued for his arrest.

6. The offence committed in Newbridge on 20th December 2013, was initially prosecuted before the Dublin Metropolitan District Court sitting at Court No. 2, the Criminal Courts of Justice, Parkgate Street, Dublin on 21st December when the accused was remanded to appear before the same court on 27th December. On that date, he was further remanded in custody with consent to bail to 24th January 2014, and, as has already been indicated, failed to appear on that date and a warrant issued for his arrest.

7. The applicant states that on a date which is unspecified and remains uncertain, he "made efforts to relocate to Donegal". On 10th April, 2014, he was arrested on foot of the warrant issued on 24th January, and brought before Buncrana District Court. He was

granted bail in respect of the Dublin offences and remanded to appear before Letterkenny District Court on 4th April. One of the conditions of bail agreed by the applicant on that occasion was that he would continue to reside at his address which was given as 137 Donegal Road, Ballybofey, Co. Donegal. He was then further remanded on bail to Letterkenny District Court to appear on 9th June. On that date the applicant was further remanded to appear on 12th September at Letterkenny District Court. On that date he failed to appear and a warrant issued for his arrest. The applicant was subsequently arrested in Letterkenny on 15th September in respect of another theft offence, and the warrant was executed, whereupon he was brought before Letterkenny District Court where he pleaded guilty and was convicted and sentenced in respect of the 33 charges. On that date his solicitor informed the court that he resided at 16, Sesiagh View, Donegal Road, Ballybofey, Co. Donegal.

8. On his appearance before the District Court in Donegal he was assigned criminal legal aid and was represented by his solicitor, Mr. Patsy Gallagher. The Prosecuting Inspector, Inspector David Kelly, was informed by the applicant's solicitor that he had received his client's signed authority to consent to the disposal of all 33 charges before Letterkenny District Court. Inspector Kelly indicated his willingness to the court to proceed only in respect of the Donegal charges and that the Dublin charges could be remanded to the Dublin District Court. The Director of Public Prosecutions directed summary disposal of all charges in respect of which such a direction was relevant. The applicant's solicitor informed the court that his client now resided in Donegal. He told the court that, where appropriate, his client could be put on his election and would elect for a summary disposal and plead guilty to all offences. It was emphasised on his behalf that the applicant did not wish the Dublin charges to be remanded to the Dublin District Court as his life was under threat from a Dublin based criminal from Inchicore in respect of a drug debt of some €30,000.00. Having considered this submission, the respondent accepted jurisdiction and dealt with the 33 charges, including the three emanating from Dublin. Following the plea of guilty, a sentence of six months imprisonment was imposed on the assault charge and one month in respect of the public order offence at the Museum Luas Stop, to run concurrently. A further sentence of one month imprisonment to run concurrently was imposed in respect of the Newbridge offence.

9. It is clear that the applicant is guilty of the offences with which he was charged and no issue arises in that regard. It was the applicant's wish that the Dublin charges be disposed of by the District Court in Donegal at the same time as the other charges before the court. He maintained that he resided in Donegal at that time and gained the advantage of having a number of matters taken into account which might otherwise not have been had all the charges not been taken together. He not only acquiesced in the procedure adopted, but instructed his solicitor to indicate to the court that it was his preferred option that these charges be dealt with by the respondent. He now claims that the orders of conviction and sentence in respect of the Dublin charges were made without jurisdiction because he was not resident in Donegal at the time of the commission of the offences.

10. The court is satisfied that at the time the applicant was arrested and charged with the offences committed in Dublin and Newbridge, he was resident in Dublin. The court is also satisfied that at the time the Dublin warrant was executed in Donegal in April, 2014, and at the time of his conviction, the applicant was resident in Donegal.

### **The Challenge**

11. The applicant claims that the respondent, who was the District Judge for Donegal District No. 1 sitting at the time of the convictions and sentence in the District Court area of Letterkenny, had no jurisdiction to enter upon the applicant's trial in respect of the three Dublin charges. It is submitted that since the applicant was residing in Dublin at the time the offences were committed and was appropriately charged before the Dublin Metropolitan District Court, it was the appropriate court in which the offences should have been tried. There was no jurisdiction to transfer the charges to the Donegal District.

12. Section 79 of the Courts of Justice Act 1924, as amended by s. 41 of the Courts and Court Officers Act 1995, s. 5 of the Criminal Justice (Miscellaneous Provisions) Act 1997, and s. 22 of the Criminal Justice Act 1999, provides that:-

"...the jurisdictions by this Act vested in and transferred to the District Court shall be exercised by the justices severally as follows:-

In criminal cases, by a justice for the time being assigned to the district wherein the crimes have been committed or the accused has been arrested or resides."

13. Order 13, r. 1 of the District Court Rules 1997, as substituted by r. 3 of the District Court (Criminal Justice Act 2007) Rules 2008 (S.I. No. 41 2008), provides that:-

"Criminal proceedings shall be brought, heard and determined either –

(a) in the court area wherein the offence charged or, if more than one offence is stated to have been committed within a judge's district, any one of such offences is stated to have been committed; or

(b) in the court area wherein the accused has been arrested, or

(c) in the court area wherein the accused resides, or

(d) in the court area specified by Order made pursuant to the provisions of s. 15 of the Courts Act 1971."

14. The notice party contends that the jurisdiction of the District Court is not limited to the area in which the accused resides at the time the offence was committed, but that the respondent as the judge for the time being assigned to the district in which the applicant resided at the time of his trial had jurisdiction to deal with the case as did the Dublin District Court. It is claimed that Letterkenny District Court and the Dublin Metropolitan District Court enjoyed simultaneous jurisdiction in relation to the Dublin charges, once it was established that at the time of his appearance before Letterkenny District Court the applicant was then resident in Donegal.

15. The District Court operates on the basis of local and limited jurisdiction defined by statute. The jurisdiction of the court is initially engaged in respect of a person arrested and charged before the court in accordance with the jurisdictional rules established under s. 79 and r. 13 of the District Court Rules. There is no statutory provision which confers a power upon a judge of the District Court to adjourn a case initiated in one district to another District Court district for disposal. There is a specific but limited provision in s. 79 as amended by the insertion of s. 79(2),(3) and (4) whereby the judge may deal with an indictable offence in any court area within his/her district or if an accused is in custody, to hear and determine proceedings in respect of summary offences "in any court area within the judge's district". However, the question posed is whether once properly commenced within one district the trial of a charge may be transferred to a different district on the basis that the judge assigned to that district may assume jurisdiction in the case, because the accused has moved his residence to a District Court area within that district. The applicant claims that it is clear from

the wording of s. 79 and r. 13, that a charge once brought in one district on the basis of the jurisdictional criteria appropriate to a District Court area, must be heard and determined in that area unless s. 79(2), (3) or (4) apply.

### **Jurisdiction**

16. The notice party has been unable to identify any statutory provision empowering the transfer of charges from one district to another for hearing and determination. Where it is clear that the jurisdictional criteria for the hearing and determination of a summary offence may give rise to simultaneous potential venues in which the proceedings may be initiated, namely the place where the offence is committed, the place where the accused is arrested, or the accused's place of residence, the prosecution must choose a venue for the charging of the accused. Rule 3 defines the appropriate venue in which the charge may be laid and prosecuted. The charge "shall be brought, heard and determined" in one of those venues. If the prosecution chooses an appropriate District Court area within a district in accordance with these jurisdictional rules, the jurisdiction of that court has been invoked and the charge must be "heard and determined" in that District Court area. The court is satisfied that for this purpose the word "brought" means "initiated".

17. In this case, had the accused not absconded and simply moved residence from the District Court area in which he was charged to Donegal, jurisdiction still remained with the Dublin Metropolitan District. It is for the prosecution to choose the jurisdictional venue. There is no general power to transfer the case from one District Court area to another. Section 5(3) of the Criminal Justice (Miscellaneous Provisions) Act 1997 permits the District Court to remand a case for hearing to a District Court (an alternative court) in the district in which a prison to which the accused is remanded is situated but has no application in this case.

18. The Dublin Metropolitan District Court was vested with jurisdiction to hear and determine the three Dublin charges. The complaints relied upon to initiate the prosecution were laid in Dublin before a judge who was authorised to receive them in accordance with the jurisdictional criteria laid down for that purpose. As noted by Kingsmill Moore J. in *Attorney General (McDonnell) v. Higgins* [1964] I.R. 374 at p. 390:-

"That an information or complaint to an authorised person is the very foundation of the jurisdiction hardly needs authority, but I may refer to *Paley on Convictions* (1st Ed. 1814) at p. 14:-

'It is requisite in all summary proceedings that there should be an information or complaint which is the basis of all subsequent proceedings and without which it seems that the justice is not authorised in intermeddling.'

Hutton on Convictions (1st Ed., 1835) has as the first words in his treatise:-

'In exercising the power of convicting summarily any person charged with having infringed the provisions of a statute the initiative proceeding is that the party complaining must present a statement of the offence complained of to a justice authorised to take such an information.'

To the same effect are Nun & Walsh, *Justice of the Peace* (2nd Ed., 1844) at p. 472; Molloy, *Justice of the Peace* (1890) at p. 169; O'Connor, *Justice of the Peace* (2nd Ed., 1915) Vol. 1 at p. 227.

Neither summons nor warrant to arrest, consequent on the information, confer jurisdiction. They are merely processes to compel the attendance of the person accused of the offence: *R. (UDC of Athy) v. Justices of Kildare: R v. Justices of Cork*."

19. The court is satisfied that the Dublin court was vested with full jurisdiction to hear and determine the three charges in this case because they were initiated following the making of complaints set out in charge sheets and laid before it. The warrant that subsequently issued was simply to compel the attendance of the accused for the trial of these charges, and thereby enable the court to exercise its jurisdiction to "hear and determine" the charges. The court is also satisfied that the requirement under s. 79 that the criminal jurisdiction of the District Court shall be exercised by a judge for the time being assigned to the district where the crime has been committed or the accused has been arrested or resides, may only be exercised upon the initiation of the complaint. The complaint must be brought in the appropriate court district and area. The matter should then be heard and determined in the District Court in which the complaint is made.

20. In *Massoud v. Judge Dunne & Ors* [2009] 3 I.R. 79, the applicants were arrested at their home which was situated in the District Court area in which warrants had been sought and obtained. They were brought before a court in a different District Court area in which the offences were alleged to have occurred, where evidence of arrest, charge and caution was adduced and orders were subsequently made remanding them on bail. The applicants claimed that they should have been brought before a court in the District Court area in which the warrants were issued and not brought to a different District Court district and/or that the District Court Judge before whom they appeared had only the power to transfer the case back to the District Court in their home District Court area. It was held, in refusing the relief sought, that the jurisdiction may be held simultaneously by Judges of the District Court, both in the District Court area where the accused persons were resident and the District Court area where the offence was allegedly committed. However, it should be noted that, in that case, it was possible, under r. 13, to initiate proceedings in either court area, but it was for the prosecution to elect the venue at which the case would be prosecuted. In this instance, it is contended that residence acquired post the initiation of a complaint thereby confers jurisdiction on the District Court in Donegal. It is clear from the judgment of MacMenamin J. that this is not so.

21. MacMenamin J. did not accept that by swearing an information and obtaining a warrant before a judge in one district who had jurisdiction, the prosecution irrevocably elected to bring the arrested party before that judge and not before another judge in another district who had a simultaneous jurisdiction in the matter on the application of the jurisdictional criteria set out in s. 79 and rule 13(1). The court rejected the submission that the prosecution was bound to bring the case before the judge who had issued the warrant and could not bring it before a judge in another district who had concomitant jurisdiction in the matter. Importantly, the learned judge also rejected the submission that the latter judge was obliged simply to transfer the matter back to the original court which had issued the warrant for disposal of the case and stated:-

"That would be the case if there was no other foundation for jurisdiction".

In *Massoud* the court was satisfied that the District Judge, before whom the accused was brought, had jurisdiction to hear and determine the matter under the statutory criteria. In this case, the court is satisfied that the District Court in Donegal did not have jurisdiction at the time of the commencement of these proceedings under s. 79 or rule 13. The proceedings had already been initiated, a complaint had been made and the jurisdiction of the Dublin Metropolitan District Court invoked. In the circumstances, on the execution of the warrant, the District Court in Donegal had only a limited power to transfer the case back to the district in which the

complaint had been made. I am satisfied that this accords with the decision of Geoghegan J. in *Coates v. Judge O'Donnell* [1997] 1 I.R. 417 as considered and applied by McMenamin J. in *Massoud*. Therefore, the court is not satisfied that the learned respondent had jurisdiction to hear and determine the Dublin charges.

22. The court is not satisfied that there is any merit in the challenge made to the warrant on the basis of the inclusion in it of the applicant's Dublin address.

### **Discretionary Relief**

23. It is clear that the applicant in this case is without merit. He pleaded guilty to the three Dublin charges before the District Court in Letterkenny. He instructed his solicitor to submit to the court that he was resident in Donegal and that the court should accept jurisdiction in the Dublin charges on that basis. In his application to this Court he attempted to resile from that position and asserted that he was at all material times resident in Dublin for the purposes of his application for judicial review. His story changed to suit his interests. When arrested in Donegal, he was admitted to bail on terms that he was to live at addresses furnished in Donegal. At no stage was any objection made to the continuing remand of the case in Donegal following his arrest on foot of the Dublin warrant. No application was made to return him to Dublin for trial on these matters.

24. If these were the only considerations, I would have no hesitation in refusing an order of *certiorari* in this case. However, the applicant is presently imprisoned on foot of one of these orders of conviction and sentence which, on the finding of the court, were made without jurisdiction: they were void *ab initio*. These proceedings were commenced as an application for an inquiry under Article 40.4 of the Constitution. On 24th September 2014, leave to apply for judicial review was granted (Barr J.). The respondent contends that the applicant acquiesced in the assumption of jurisdiction by the respondent in this case and is now estopped from challenging the District Court convictions and sentences in the three cases because he pressed the court to accept jurisdiction on legal advice, represented to the court specifically that he was resident within Donegal in order to convince the court that jurisdiction should be accepted, and pleaded guilty to the three offences charged. Reliance is placed upon a number of Supreme Court decisions, including *The State (Byrne) v. Frawley* [1978] I.R. 326, and *Gorman v. Judge Martin & Ors* [2005] IESC 56 and the judgment of Ó Caoimh J. in *Burns v. Judge Earley & Ors* [2003] 2 ILRM 321. Each of these cases concerns a challenge in respect of trials on indictment.

25. In the *Gorman* case, the applicant pleaded guilty to a series of offences in the Circuit Criminal Court in respect of which an eight year sentence of imprisonment was imposed, and challenged the order of conviction and sentence on the basis that the District Court had not conducted a lawful preliminary examination and that the return for trial was null and void. It was submitted that the Circuit Court had no jurisdiction to try him in the absence of a valid preliminary examination and return for trial. It was held that the High Court was correct in determining that the District Court had erred in sending the accused forward for trial. This aspect of the ruling was upheld on appeal, but it was also submitted to the Supreme Court that the applicant was disentitled to relief by reason of delay in bringing the application and that the applicant was estopped from raising a point as to jurisdiction having pleaded guilty in the Circuit Court to the offence with which he was charged. Kearns J. (as he then was) stated:-

"Where a defective return for trial to the Circuit Court or Central Criminal Court is made by the District Court, but the subsequent proceedings are disposed of by means of a plea of guilty, notably in cases of no great complexity, should the remedy of judicial review thereafter be available?...It might of course be argued that the applicant was given erroneous legal advice so that he lacked legal representation when he elected to have his case dealt with by means of a plea in the Circuit Court. That, however, ignores the fact that the applicant was himself aware of his entitlements under the Criminal Procedure Act 1967. He apparently dismissed his legal advisers because they were not persuaded by the merits of his contentions at the time. Then on the following day when the matter came before the second named respondent (the trial judge) the applicant was offered alternative legal representation, but declined to avail of this offer, electing instead to plead guilty to the offence with which he had been charged.

In the particular circumstances I can only see this behaviour on the part of the applicant as a form of acquiescence. He has made no claim in the course of this application that he was innocent of the offence with which he was charged. He freely admitted the offence by pleading guilty and there is no suggestion he was under any form of pressure to do so. The offence itself is not one of any technical complexity, being a charge that he assaulted a fellow prisoner. He did not seek to raise the point about the applicability on the 1967 Act when arraigned before the second named respondent, nor did he raise it in the course of any appeal following the imposition of sentence. It cannot be said, and it is not contended, that the question of law raised affected the fairness of the verdict based on that plea or that it gives rise to a risk of injustice in respect of the verdict.

Had the applicant pleaded not guilty and had he canvassed this point at his trial by the second named respondent, I must confess I might have arrived at a different conclusion in this matter. That said, however, the applicant's plea of guilty suggests that there are no merits in this case which would warrant this Court exercising its jurisdiction on discretionary grounds to set aside the conviction. Indeed all discretionary factors strongly suggest to me that the opposite is the case. To set aside the conviction now in circumstances where the accused pleaded guilty, and to remit the matter back to the District Court when it is unclear whether or not a trial can ever take place, would strike me as an inappropriate exercise by this Court of its discretion."

26. Kearns J. considered it relevant that there was significant delay in the initiation of the judicial review proceedings and that the quashing of the conviction and sentence might give rise to difficulties in holding a trial because witnesses might no longer be available or other relevant evidence might have disappeared or been disposed of. He noted also the views of Henchy J. expressed in the *Byrne* case that a prisoner who freely and knowingly elected at his trial to accept a jury as competent to try him was precluded by that election from claiming that the jury lacked constitutionality following the decision in *De Burca v. The Attorney General* [1976] I.R. 38. An acquiescence in the mode of trial and in the conviction and its legal consequences "would appear to raise an insuperable barrier against a successful challenge at this stage to the validity of such conviction or sentence" (p. 349). (See also *Lynch v. Judge Anderson* [2010] IEHC 284).

27. Similarly in the *Burns* case, O'Keeffe J. refused relief to the applicant who had pleaded guilty before the Special Criminal Court and relied upon that fact in support of a plea and mitigation of sentence. The applicant waited a number of months following the orders of conviction and sentence to challenge a return for trial order by way of judicial review. O'Keeffe J. was satisfied that the applicant having freely elected to accept the jurisdiction of the Special Criminal Court to try him, was precluded by that election from claiming that the court lacked jurisdiction.

28. It is submitted that these cases may be distinguished from the present case on the basis that they were in respect of trials on indictment and involved considerable delay in circumstances where it was well within the knowledge of the applicants in each case that there was a point to be taken. In this case there was no delay in that an immediate application was made for relief under Article

40.4 of the Constitution and thereafter a prompt application was made to this Court for leave to apply for judicial review. Furthermore, it is submitted that the applicant could never have acquiesced in the exercise of jurisdiction with which the respondent was never vested by statute. It is only two months since the date of conviction and sentence. If the matter were remitted by this Court to the Dublin Metropolitan District Court it could be heard relatively promptly. The court must also consider the extent of the jurisdictional defect in the order made in this case. The District Court had no jurisdiction to hear and determine the Dublin charges. The applicant is now imprisoned pursuant to one of the challenged orders. In the circumstances, I am not satisfied that it is appropriate to exercise discretion against the making of an order of *certiorari* in this case. A fundamental point of distinction is that the orders made in the cited cases were voidable. The orders in this case were void *ab initio*. They were not challenged on the basis of a technicality or procedural irregularity. The challenge was based on a jurisdictional error central to the exercise of judicial power by the respondent under Article 34.4 of the Constitution. The supervisory remedy of judicial review is designed to address this type of fundamental jurisdictional error and to ensure the proper administration of justice in courts of local and limited jurisdiction.

29. I am, therefore, satisfied that the applicant has established that the three orders are fundamentally flawed and should be quashed. The matters should be remitted to the Dublin Metropolitan District Court to be heard and determined in accordance with law.