

THE HIGH COURT

[2015 No. 310 SS]

**IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT 1857 AS EXTENDED BY SECTION 51 OF THE COURTS
(SUPPLEMENTAL PROVISIONS) ACT 1961**

BETWEEN

DAVID RADFORD

APPELLANT/ACCUSED

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF SERGEANT DECLAN BIRCHELL)

RESPONDENT/PROSECUTOR#

JUDGMENT of Mr. Justice Noonan delivered the 7th day of July, 2015.

Background

1. This is an appeal by way of case stated by Judge John O'Connor, Judge of the District Court assigned to the Dublin Metropolitan District. On the 13th of January, 2014, the appellant appeared before the Dublin Children's Court charged with an offence contrary to s. 12(1)(a) and (3) of the Sex Offenders Act 2001 as amended by s. 13 of the Criminal Law (Human Trafficking) Act 2008. The particulars of the offence alleged pursuant to charge sheet number 14123243 were as follows:

"That on a dates (sic) between 22/07/2013 and 23/09/2013 within the jurisdiction of the State, being a person to whom Part 2 of the Sex Offenders Act 2001 applied did fail to notify the Garda Síochána of a change in your home address as required by the provisions of s. 10(2) of the said Act.

Contrary to s. 12(1)(a) and (3) of the Sex Offenders Act 2001 as amended by s. 13 of the Criminal Law (Human Trafficking) Act 2008."

2. At the hearing, the prosecution called two witnesses, Sergeant Birchell and the appellant's father, Mr. David Radford senior. Mr. Radford senior gave evidence that from July, 2013, the appellant began on a regular basis to not stay at his home address of 28 Burg an Ri Glen, Lucan, County Dublin, being the address notified to An Garda Síochána as his home address. He returned and stayed periodically. Mr. Radford stated that the appellant had not stayed at his home address since the 18th of July, 2013. It would appear that on the 19th of July, 2013, the appellant was afforded temporary emergency accommodation by the HSE, now the Child and Family Agency, and from the 1st of August, 2013 in more permanent accommodation provided by the Agency. However, the appellant's new address was not formally notified to An Garda Síochána until the 23rd of September, 2013.

3. At the close of the prosecution case, counsel for the appellant sought a direction that there was no case to answer on the basis that the offence alleged is a date specific offence and that the prosecution had not proven that the offence was committed on a specific date and further that the range of dates in the charge sheet made the charge vague. The prosecution contended that the defendant commits an offence after a period of seven days and continues to commit that offence until the notification occurs.

4. The matter was adjourned by the District Judge for written submissions and when the hearing resumed on the 19th of March, 2014, the Judge amended the charge sheet so that it now read:

"On a date unknown between 1/07/2013 and 23/09/2013 within the jurisdiction of the State, being a person to whom Part 2 of the Sex Offenders Act 2001 applied, did without reasonable excuse fail to notify An Garda Síochána of a change in your home address as required by the provisions of s. 10(2) of the Act".

Having made that amendment, the Judge proceeded to convict the appellant.

5. The questions posed by the District Judge for the opinion of this court are as follows:

(a) Whether an offence contrary to s. 12(1)(a) Sex Offenders Act is a date specific offence and requires a statement in the charge sheet of the exact date on which it was alleged to have occurred.

(b) Whether the court was correct in law in convicting the appellant in the absence of evidence of the exact date when the change of address occurred.

The Legislation

6. Section 10 of the Sex Offenders Act 2001 provides as follows:

"10.—(1) A person who is subject to the requirements of this Part shall, before the end of the period of 7 days beginning with the relevant date, or, if that date is prior to the commencement of this Part, that commencement, notify to the Garda Síochána—

(a) his or her name and, where he or she also uses one or more other names, each of those names, and

(b) his or her home address.

- (2) A person who is subject to those requirements shall also, before the end of the period of 7 days beginning with—
- (a) the person's using a name which is not the name, or one of the names, last previously notified by him or her to the Garda Síochána under this section,
 - (b) any change of his or her home address,
 - (c) the person's having resided or stayed, for a qualifying period, at any place in the State, the address of which has not been notified to the Garda Síochána under this section as being his or her current home address, or
 - (d) the person's returning to an address in the State, having, immediately prior to such return, been outside the State for a continuous period of 7 days or more, notify that name, the effect of that change, the address of that place or, as the case may be, the fact of that return to the Garda Síochána...
- (6) A notification given to the Garda Síochána by any person shall not be regarded as complying with *subsection (1), (2), (3) or (4)* unless it also states the person's—
- (a) date of birth,
 - (b) name on the relevant date and, where he or she used one or more other names on that date, each of those names, and
 - (c) home address on the relevant date...
- (8) A person may give a notification under this section—
- (a) by attending in person at any Garda Síochána station which is a divisional or district headquarters and notifying orally a member of the Garda Síochána at the station of the matters concerned,
 - (b) by sending, by post, a written notification of the matters concerned to any Garda Síochána station which is such a headquarters, or
 - (c) by such other means as may be prescribed...
- (11) In this section—
- "home address", in relation to any person, means the address of his or her sole or main residence or, if he or she has no such residence, his or her most usual place of abode or, if he or she has no such abode, the place which he or she regularly visits;
- "qualifying period" means—
- (a) a period of 7 days, or
 - (b) 2 or more periods, in any period of 12 months, which (taken together) amount to 7 days."

7. Section 12 of the Sex Offenders Act 2001, as amended, provides as follows:

- "12.—(1) A person who—
- (a) fails, without reasonable excuse, to comply with *subsection (1), (2), (3) or (4) of section 10*, or
 - (b) notifies to the Garda Síochána, in purported compliance with that *subsection (1), (2), (3) or (4)*, any information which he or she knows to be false or misleading in any respect, shall be guilty of an offence.
- (2) A person is guilty of an offence under *subsection (1)(a)* on the day on which he or she first fails, without reasonable excuse, to comply with *subsection (1), (2), (3) or (4)*, as the case may be, of *section 10* and continues to be guilty of it throughout any period during which the failure continues; but a person shall not be prosecuted under that provision more than once in respect of the same failure.
- (3) A person guilty of an offence under this section shall be liable –
- (a) on summary conviction, to a fine not exceeding €5,000 or imprisonment for a term not exceeding 12 months or both.
 - (b) on conviction on indictment to a fine not exceeding €10,000, or imprisonment for a term not exceeding five years, or both.
- (4) In proceedings for an offence under *subsection (1)(a)* a statement on oath by a member of the Garda Síochána referred to in *subsection (5)* that no notification of the matters concerned was given by the defendant to the Garda Síochána by any of the means referred to in *section 10(8)* shall, until the contrary is shown, be evidence that no such notification was given by the defendant.

(5) The member of the Garda Síochána referred to in *subsection (4)* is a member not below the rank of sergeant who, from his or her evidence to the court, the court is satisfied—

(a) is familiar with the systems operated by the Garda Síochána for recording the fact that particular information has been received by them, and

(b) has made all proper inquiries in ascertaining whether a notification by the defendant of the matters concerned was received by the Garda Síochána.

The Arguments

8. The primary submission advanced by Ms. Burns SC on behalf of the appellant is that the offence created by s. 12 is date specific and in that respect, time is of the essence of the offence. Accordingly, she submitted that the offence is committed on the 8th day after a change of address occurs either on a consecutive or cumulative basis, such day being “the day on which he or she first fails” to notify the change of address. Section 12(2) provides that thereafter, the accused continues to be guilty of the offence throughout the period during which the failure continues but can only be prosecuted once in respect of the same failure.

9. Accordingly Ms. Burns contended that if the evidence before the District Judge established that the appellant left his previous home address on the 18th of July, 2013, the date upon which he first failed to notify the change was the 26th of July and thus, had the accused been charged with committing the offence on that date, he could have no complaint.

10. I asked Ms. Burns if this meant that the appellant was arguing that the offence could not be proved unless the prosecution were in a position to establish when the accused left his previous address, even if they were in a position to prove that he had not been at the address for any seven day period. Despite the fact that the appellant’s written submissions appeared to advance this argument, Ms. Burns conceded that this was not being contended for by the appellant. Rather, he was arguing that if the prosecution were in a position to establish the requisite seven day period, even if it did not begin on the actual date when he changed address, the offence would be committed on the day after the expiry of that seven day period.

11. However, what was not permissible was what the District Judge did in this case, namely, substitute an unknown date between two certain dates since the section called, on the appellant’s argument, for a date to be specified.

12. As a subsidiary argument, Ms. Burns submitted that the appellant could not be found guilty on foot of the charge sheet as amended by the District Judge because on the prosecution evidence, the accused could not be convicted of having committed an offence prior to the 8th of July, 2013 and thus the charge sheet related to a period during which, for a part thereof at least, the offence could not have been committed. It was further argued that as the statute was penal, it had to be construed strictly and if it admitted of more than one interpretation, that which favoured the accused had to be adopted. Reliance in that regard was placed on *Mullins v. Harnett* [1998] 4 I.R. 426 (at pp. 434-435) and *DPP v. Farrell* [2010] IECCA 94. It was said further on behalf of the appellant that this was not a case, like many of the authorities on sexual and other offences, where a date did not have to be specified where no injustice resulted to the accused in consequence. Rather, it was said that the question of justice or indeed prejudice to the accused was not material here because the date itself was an essential ingredient of the offence.

13. Ms. Brennan BL on behalf of the respondent submitted that as long as the offence was established, it did not matter on what date it occurred during the relevant period. It was unnecessary for the charge sheet to nominate a date upon which the offence was committed and it was perfectly permissible for the District Judge to amend it to provide for a date unknown within a specified period. She submitted that it did not matter how the charge sheet was framed once the appellant knew the case he had to meet and there were many authorities to this effect. There was also no question of prejudice arising in this case and the date upon which the offence actually occurred was not of the essence of the offence.

Discussion

14. In *R v. Dossi* (1919) 13 Cr. App. R. 158, the English Court of Criminal Appeal considered a conviction for indecent assault. In the course of delivering the Court’s judgment, Atkin J. said (at p. 1):

“The first point taken on behalf of the appellant is that there was no power to amend the indictment and that when the jury found that the appellant had not committed the acts charged against him on the date specified in the indictment but on some other day or days they found him not guilty and that that verdict must stand. It appears to us that that is not a correct contention in law. From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence...thus, though the date of the offence should be alleged in the indictment, it has never been necessary that it should be laid according to truth unless time is of the essence of the offence. It follows, therefore, that the jury were entitled, if there was evidence on which they could come to that conclusion, to find the appellant guilty of the offence charged against him, even though they found that it had not been committed on the actual date specified in the indictment.”

15. *Dossi* was cited with approval in *The People (DPP) v. Walsh* [2010] 4 I.R. 746.

16. The issue of the accused being charged with an offence on an unknown date within a period, during at least part of which the offence could not have been committed, was considered by the Court of Criminal Appeal in *DPP v. Farrell* [2010] IECCA 94. In the course of delivering the Court’s judgment, Fennelly J. stated (at p. 3):

“The second heading of argument in respect of counts 1 and 2 is that, on the evidence, the offences could not have been committed within the time alleged, having regard to the evidence given by the complainant and to the dates.

Firstly, with regard to the one year period covered by the count, the court does not accept that the judgment of Mr. Justice Egan [in *DPP v. E.F.* (Unreported, Supreme Court, 24th February, 1994)] laid down any general propositions specifying any period of time as being the longest permissible to be covered by offences of this sort. Of course it is a general proposition of law that no count should be framed so as to give rise to an injustice, so as to place the defendant at an unfair disadvantage at his trial but in the case of sexual offences which the courts have unfortunately had very great experience over recent years, it has been recognised that it is notoriously difficult to pin down times in respect of individual charges. Typically – and this case is an example – offences are alleged to have taken place regularly over a number of years and, reverting to Mr. Justice Egan’s judgment it is recognised that an attempt must be made to frame charges so as to give as much precision as is possible and not put the defendant at an undue disadvantage. But it is only

where it can be shown that the period of time specified will work an injustice that a legitimate complaint can be made. The charge in the present case is made in a period to cover one calendar year and, in addition, the crucial point is that, on the evidence, it is particularised by reference to the particular place, unique to that particular charge on the indictment, and to particular parts of the evidence. The court has examined the submissions made and the facts relating to the evidence of the complaint and does not accept that the applicant has made out any case to the effect that the offences could not have been committed within that period or, as is submitted, that they should be regarded as having been committed in May or June 1992. The complainant's evidence was based on a number of simple propositions; firstly that she born in 1984 and she attained the age of seven therefore on the 17th of June 1991; secondly that she moved into that house at Bridge Street in that year – we know otherwise that it was on the 17th August; - thirdly, that she made her First Holy Communion in that year; and fourthly that the offences that she described took place a couple of months after the moving into the house. In these circumstances the court is satisfied that, combined with the one year period, the place and times sufficiently particularise this offence and furthermore that there is nothing in the evidence given which warrants a conclusion that the jury could not have convicted on the basis of the complainant's evidence, on the basis that these events occurred in that house within the period specified in those accounts. Of course all that is dependant on the jury being so satisfied beyond reasonable doubt and clearly there were and when properly directed in that respect."

17. It was clear from the evidence in that case that the complainant only moved into the house where the offence was alleged to have taken place in August, 1991, although the accused was charged with having committed the offence between June, 1991 and June, 1992. Accordingly, it was clear that the offence could not have been committed during at least part of the period alleged in the indictment. In his authoritative work on criminal procedure (Dermot Walsh, *Walsh on Criminal Procedure*, (Dublin, 2015), Professor Walsh deals with the law relating to the particulars that must be given in the indictment in the context of s. 4(1) of the Criminal Justice (Administration) Act 1924, which provides:

"Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge."

18. He goes on to deal with the necessary particulars of the offence (at para. 15 – 08) and says:

"The key issue is whether the particulars stated in the indictment or elsewhere make clear to the defence the nature of the case it has to meet. Even errors of fact will not be fatal so long as the defence is not prejudiced by the erroneous description of the offence. The particulars of the offence are not to be treated like the words of a statute. It is also worth noting that the particulars will be important in identifying what it is that the accused is admitting to for the purposes of sentence on a guilty plea."

19. He continues (at para. 15 – 11):

"4. Date and Location.

The date and location of the events do not normally have to be specified with detailed precision. If the exact date of commission is unknown it is usually acceptable to state "at a date unknown" between two specified dates. This practice is often followed in child sexual abuse cases where the abuse is alleged to have been carried out over a period of time. In such cases the indictment will normally consist of a number of counts, each of which will charge a single sexual assault on a date unknown between two specified dates which are twelve months apart. The reality often is that several assaults will have been committed during this period, but the rule against duplicity (see below para. 15 – 15 et seq.) prevents the indictment from charging the commission of two or more identical offences during the same period."

20. And finally (at para. 15 – 12):

"An error concerning the date specified in the indictment will not necessarily be fatal to a conviction, unless the accused has been prejudiced by the error. Clearly the timing of the alleged offence is relevant to the offender's liability as, for example, where the age of the victim is a factor, an error may prove fatal."

Conclusion

21. It seems to me that if the construction of s. 12(2) contended for by the appellant is correct and the offence is only committed on a specific day being the 8th day after a failure to notify a change of address, the second part of the subsection which provides that a person shall continue to be guilty of the offence throughout the period during which the failure continues is surplusage and can have no meaning. I do not think that this can have been the intention of the legislature. Thus, applied to the facts of the present case, in my view the section can only be construed so as to mean that the offence was first committed on the 1st day after the relevant 7 day period and continued to be committed on each subsequent date up to and including the 22nd of September, 2013.

22. The District Judge may well have concluded that the evidence established that the commencement of the commission of the offence occurred on an uncertain date on or after the 1st July, 2013 having regard to the evidence of Mr. Radford Senior but that it was not possible to determine beyond a reasonable doubt when that commencement occurred. In my view, it was thus open to him to amend the charge sheet in the way he did, without objection, even though on the evidence, such commencement cannot have occurred before the 8th July, 2013.

23. Accordingly, it cannot be said that the offence is date specific to the first day after the elapse of the 7 day period. In my view, the date upon which the offence was first committed is not of the essence of the offence as the applicant could equally have been validly charged with committing the offence on any of the subsequent dates referred to. Once the prosecution have established that the requisite 7 day period has elapsed, it is not to my mind material what subsequent date is alleged as being the date upon which the offence was committed. The authorities above referred to establish clearly that the date is not material except where the date itself is of the essence of the offence and I am satisfied in this case that it is not.

24. The appellant does not contend that any prejudice arises as a result of the manner in which the charge sheet was recast by the District Judge and there is no doubt that he was at all times aware of the case he had to meet. That situation is not altered by the fact that for part of the period identified in the charge sheet, the offence could not have been committed.

25. Accordingly, I propose to answer the questions posed by the District Judge as follows:

(a) No.

(b) Yes.