



THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 23

[2017 No. 454]

The President

Whelan J.

McCarthy J.

IN THE MATTER OF SECTION 16 OF THE COURTS OF JUSTICE ACT 1947

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR

AND

JM

ACCUSED

JUDGMENT of the Court delivered on the 31st day of January 2019 by Birmingham P.

1. These proceedings arise from a consultative case stated from the Circuit Court which asks the question whether the DPP has a right of appeal from a finding in the District Court that an accused person was unfit to be tried.

2. The background to the case is to be found in the fact that JM, to whom I will refer as the accused, was charged in the District Court with offences contrary to s. 2 of the Non-Fatal Offences against the Person Act 1997 and s. 2 of the Criminal Damage Act 1991. These offences were alleged to have occurred on 15th January 2014, at a time when the accused was a minor, his date of birth being 23rd October 1997. The question of fitness to be tried was raised by the defence in the District Court. Proceedings were adjourned to allow both defence and prosecution to obtain medical reports with the option of calling oral evidence. A considerable volume of evidence was put before the District Court and on 21st July 2016, Judge John O'Connor found, on the balance of probabilities, that the accused was unfit to be tried. By Notice of Appeal dated 29th July 2016, the DPP indicated that it wished to appeal the finding of unfitness.

3. The proceedings were listed for mention before the Circuit Court in Dublin on 7th December 2016, at which point the defence indicated that there would be a legal challenge to any appeal being taken by the prosecution on the grounds of unfitness. Both sides prepared written submissions to assist the Court and the matter came on for legal argument on 23rd February 2017. The Circuit Court Judge reserved judgment and the parties were notified that the Judge would rule on the matter on 16th March 2017. However, on that date, counsel for the DPP told the Circuit Court that she now had instructions to ask the Court to state a consultative case on the issue rather than rule on it. The Circuit Court Judge acceded to the request. The question posed in the case stated is as follows: "[d]oes section 7 of the Criminal Law (Insanity) Act 2006 permit an appeal by the Director of Public Prosecutions to the Circuit Court against a finding of unfitness to be tried made by a Judge of the District Court?"

4. The statutory provision most in issue in this case stated is s. 7 of the Criminal Law (Insanity) Act 2006. However, to provide context, it is helpful to refer to the terms of s. 4 of the same Act. It provides as follows:

"4.— (1) Where in the course of criminal proceedings against an accused person the question arises, at the instance of the defence, the prosecution or the court, as to whether or not the person is fit to be tried the following provisions shall have effect.

(2) An accused person shall be deemed unfit to be tried if he or she is unable by reason of mental disorder to understand the nature or course of the proceedings so as to—

(a) plead to the charge,

(b) instruct a legal representative,

(c) in the case of an indictable offence which may be tried summarily, elect for a trial by jury,

(d) make a proper defence,

(e) in the case of a trial by jury, challenge a juror to whom he or she might wish to object, or

(f) understand the evidence.

(3) (a) Where an accused person is before the District Court (in this section referred to as 'the Court') charged with a summary offence, or with an indictable offence which is being or is to be tried summarily, any question as to whether or not the accused is fit to be tried shall be determined by the Court.

(b) Subject to subsections (7) and (8), in a case to which paragraph (a) relates, the Court determines that an accused person is unfit to be tried, that Court shall adjourn the proceedings until further order, and may—

(i) if it is satisfied, having considered the evidence of an approved medical officer adduced pursuant to subsection (6) and any other evidence that may be adduced before it that the accused person is suffering from a mental disorder (within the meaning of the Act of 2001) and is in need of in-patient care or treatment in a designated centre, commit him or her to a specified designated centre until an order is made under section 13, or

(ii) if it is satisfied, having considered the evidence of an approved medical officer adduced pursuant to subsection (6) and any other evidence that may be adduced before it that the accused person is suffering from a mental disorder or from a mental disorder (within the meaning of the Act of 2001) and is in need of out-patient care or treatment in a designated centre, make such order as it thinks proper in relation to the accused person for out-patient treatment in a designated centre.

(c) Where in a case to which paragraph (a) relates, the Court determines that the accused person is fit to be tried the proceedings shall continue.

(4) (a) Where an accused person is before the Court charged with an offence other than an offence to which paragraph (a) of subsection (3) applies, any question as to whether that person is fit to be tried shall be determined by the court of trial to which the person would have been sent forward if he or she were fit to be tried and the Court shall send the person forward to that court for the purpose of determining that issue.

[(aa) In a case to which paragraph (a) relates, the Court may request evidence of an approved medical officer to be adduced before it in respect of the accused person for the purposes of—

(i) determining whether to adjourn the proceedings until further order to facilitate the accused person in accessing any care or treatment necessary for the welfare of the person,

(ii) making a determination as to whether or not the accused person is fit to be tried, or

(iii) exercising a power referred to in subsection (6)(a).

(b) Where an accused person is sent forward to the court of trial under paragraph (a), the question of whether the person is fit to be tried shall be determined by the judge concerned sitting alone.

(c) If the determination under paragraph (b) is that the accused person is fit to be tried, the provisions of the Criminal Procedure Act 1967, shall apply as if an order returning the person for trial had been made by the Court under section 4A of that Act (inserted by section 9 of the Criminal Justice Act 1999) on the date the determination was made but, in any case where section 13 of that Act applies, the person shall be returned for trial.

(d) If the determination under paragraph (b) is that the person is unfit to be tried the provisions of subsection (5) shall apply.

(e) Where the court subsequently determines that the person is fit to be tried the provisions of the Criminal Procedure Act 1967, shall apply as if an order returning the person for trial had been made by the Court on the date the determination was made.

(5) (a) Where an accused person is before a court other than the Court charged with an offence and the question arises as to whether that person is fit to be tried the provisions of this subsection shall apply.

(b) The question of whether the accused person is fit to be tried shall be determined by the judge concerned sitting alone.

(bb) In a case to which paragraph (a) relates, the court may request evidence of an approved medical officer to be adduced before it in respect of the accused person for the purposes of—

(i) determining whether to adjourn the proceedings until further order to facilitate the accused person in accessing any care or treatment necessary for the welfare of the person,

(ii) making a determination as to whether or not the accused person is fit to be tried, or

(iii) exercising a power referred to in subsection (6)(a).]

(c) Subject to subsections (7) and (8), if the judge determines that the accused person is unfit to be tried, he or she shall adjourn the proceedings until further order, and may—

(i) if he or she is satisfied, having considered the evidence of an approved medical officer adduced pursuant to subsection (6) and any other evidence that may be adduced before him or her that the accused person is suffering from a mental disorder (within the meaning of the Act of 2001) and is in need of in-patient care or treatment in a designated centre, commit him or her to a specified designated centre until an order is made under section 13, or

(ii) if he or she is satisfied, having considered the evidence of an approved medical officer adduced pursuant to subsection (6) and any other evidence that may be adduced before him or her that the accused person is suffering from a mental disorder or from a mental disorder (within the meaning of the Act of 2001) and is in need of out-patient care or treatment in a designated centre, make such order as he or she thinks proper in relation to the accused person for out-patient treatment in a designated centre.

(d) Where the court determines that the accused person is fit to be tried the proceedings shall continue.

(6) (a) For the purposes of determining whether or not to exercise a power under subsection (3)(b)(i) or (ii) or subsection (5)(c)(i) or (ii), the court, having considered the evidence of an approved medical officer adduced before it in respect of the accused person—

(i) may for that purpose—

(I) commit the accused person to a designated centre for a period of not more than 14 days, or

(II) by order direct that the accused person attend a designated centre as an outpatient on such day or days as the court may direct within a period of 14 days from the date of the making of the order,

and

(ii) shall direct that the accused person concerned be examined by an approved medical officer at the designated centre.

(b) Within the period authorised by the court under this subsection, the approved medical officer who examined the accused person pursuant to subparagraph (ii) of paragraph (a) shall report to the court on whether or not in his or her opinion the accused person is—

(i) suffering from a mental disorder (within the meaning of the Act of 2001) and is in need of in-patient care or treatment in a designated centre, or

(ii) suffering from a mental disorder or a mental disorder (within the meaning of the Act of 2001) and is in need of out-patient care or treatment in a designated centre.] (7) Where on the trial of an accused person the question arises as to whether or not the person is fit to be tried and the court considers that it is expedient and in the interests of the accused so to do, it may defer consideration of the question until any time before the opening of the case for the defence and if, before the question falls to be determined, the jury by the direction of the court or the court, as the case may be, return a verdict in favour of the accused or find the accused person not guilty, as the case may be, on the count or each of the counts on which the accused is being tried the question shall not be determined and the person shall be acquitted.

(8) Upon a determination having been made by the court that an accused person is unfit to be tried it may on application to it in that behalf allow evidence to be adduced before it as to whether or not the accused person did the act alleged and if the court is satisfied that there is a reasonable doubt as to whether the accused did the act alleged, it shall order the accused to be discharged.

(9) Where evidence is adduced before the court under subsection (8) but the court decides not to order the accused person to be discharged, no person shall publish a report of the evidence or the decision until such time, if any, as—

(a) the trial of the person concludes, or

(b) a decision is made not to proceed with the trial of the person or the trial is otherwise not proceeded with.

(10) A person who contravenes subsection (9) shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €3,000 or to imprisonment for a term not exceeding 12 months or to both."

Section 7 of the 2006 Act provides as follows:

"7.— (1) An appeal shall lie to the Circuit Court from a determination by the District Court, pursuant to section 4 (3), that an accused person is unfit to be tried.

(2) On an appeal from a determination referred to in subsection (1), the Circuit Court shall, if it allows the appeal, order that the appellant be tried or retried, as the case may be, by the District Court for the offence alleged, but if the District Court, pursuant to section 4 (7), postponed consideration of the question as to the accused's fitness to be tried and the Circuit Court is of opinion that the appellant ought to have been found not guilty before the question as to fitness to be tried was considered, the court shall order that the appellant be acquitted.

(3) An appeal shall lie to the Court of Criminal Appeal from a determination by the Central Criminal Court, the Circuit Court or the Special Criminal Court that an accused person is unfit to be tried, and if the Court of Criminal Appeal allows the appeal it shall order that the appellant be tried or retried as the case may be for the offence alleged but if the court concerned, pursuant to section 4 (7), postponed consideration of the question as to the accused's fitness to be tried and the Court of Criminal Appeal is of opinion that the appellant ought to have been found not guilty before the question as to fitness to be tried was considered, the court shall order that the appellant be acquitted.

(4) Where an order is made pursuant to subsection (2) or (3) directing the accused be tried or retried, as the case may be, for the offence alleged, the accused may be tried or retried for an offence other than the offence alleged in respect of which he or she was found unfit to be tried being an offence of which he or she might be found guilty on a charge for the offence alleged.

5. Because of the significance attached to it by the prosecution, it is appropriate to refer to the provisions of s. 9, subsection 4 of the Act which provides:

"9. (4) The powers of an appellate court in an appeal under section 7, 8 or 9 (1) shall include the power to make any such order as may be necessary for the purpose of doing justice in accordance with the provisions of this Act."

The Submissions of the Parties

6. On behalf of the accused, it is said that the terms of the statute, and in particular, section 7, contemplate only an appeal being brought by an accused person. It is said that the references to the fact that if an appeal is allowed by the Circuit Court, that Court shall order that the appellant be tried or retried is highly significant. Indeed, the wording of the section makes absolutely clear, it is said, that no appeal can be brought by the Director of Public Prosecutions who is never going to be tried or retried in this context. It is submitted on behalf of the accused that the wording of the statute is clear and unambiguous, but also that the section in its ordinary meaning fits neatly into the architecture of the statute. The DPP does not need, and it is said, does not have a right of appeal, but does have the option of re-entering and relisting the proceedings before the Court which made the original determination. It is said that a finding of unfitness is not a final order, it is not a determination that a person is unfit to be tried and will be so for all time. Rather, there is a recognition that a person found to be unfit at a particular stage may at a later stage be found no longer unfit to be tried.

7. On behalf of the accused, it is said that prosecution appeals are very far from the norm and there could be no justification for making an assumption that the Oireachtas had intended to provide the Director with a right of appeal where it is not explicitly

provided for.

8. The DPP points out that the language of s. 7 differs from that found in sections 8 and 9. Section 8 deals with cases where persons have been found not guilty by reason of insanity and provides:

“8.— (1) A person tried for an offence in the District Court and found not guilty by reason of insanity may appeal against the finding to the Circuit Court on any or all of the following grounds:

(a) that it was not proved that he or she had committed the act in question;

(b) that he or she was not, at the time when the act was committed, suffering from a mental

(c) that the District Court ought to have made a determination in respect of the person that he or she was unfit to be tried.”

Section 9(1) deals with appeals against the making or non-making of committal orders and provides that an appeal against a decision by the court of trial shall lie at the instance of the defence or the prosecution to the Circuit Court or Court of Criminal Appeal as may be appropriate.

9. The Director says that s. 7(1) states that an appeal lies to the Circuit Court from a determination by the District Court that an accused person is unfit to be tried. It is submitted that there is nothing in that subsection that restricts or confines the right to appeal. The statement is a simple one and unqualified “an appeal shall lie”.

10. In the course of written submissions on behalf of the Director, it is submitted that “[t]he use of the word ‘appellant’ in s. 7(2) and (3) should not be construed as a shorthand method of expressing intention to limit the right of appeal to the person found unfit to be tried. The term is used as a shorthand way of describing the identity of the person who is the subject of the appeal. The term ‘appellant’ as used here is a reference to ‘the person who is the subject of the appeal’. This is the real meaning of the term”.

11. I am afraid that I cannot agree with the submissions of the Director. The word ‘appellant’ appears no less than six times in subsections (2) and (3) and I find it impossible to believe that it was not used with deliberation. A quick scan of a number of legal dictionaries does not provide any support for the suggestion that the word ‘appellant’ can be interpreted in the way contended for by the DPP. By way of example, Osbornes ‘Concise Law Dictionary’ 12th Ed. defines appellant as “one who appeals”. The Oxford Dictionary of Law defines as a “person who makes an appeal to a Court that has the jurisdiction to hear appeals, such as the Court of Appeal”. Mozley & Whitley, 11th Ed. under the entry ‘Appellant’ says, “see appeal”, and there, what appears is “a complaint to a Superior Court of an injustice done by an inferior one. The party complaining is styled the appellant, the other party, the respondent”. Murdoch, 6th Ed. defines appellant as “a person who appeals”. This unanimity was entirely to be expected.

12. In the circumstances, I am satisfied that the clear wording of s. 7 precludes appeals by the Director of Public Prosecutions.

13. Accordingly, I would answer the question posed by the learned Circuit Court Judge as follows: No.