Neutral Citation Number: [2005] IEHC 430

**THE HIGH COURT**

**Record Number: 2005 No. 1799 SS**

**IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40 OF THE CONSTITUTION OF IRELAND 1937**

**BETWEEN**

**KEVIN O'KEEFFE**

**APPLICANT**

**AND**

**THE GOVERNOR OF SAINT PATRICK'S INSTITUTION**

**RESPONDENT**

**Judgment of Mr Justice Michael Peart delivered on the 13th day of December 2005**

1. The applicant submits that his detention is unlawful. The circumstances alleged to constitute this illegality are that having been charged with eight offences as set forth on certain Balbriggan Garda Charge Sheets as exhibited herein, he appeared before Judge Brophy in District Court 44 on the 5th August 2005 when evidence of arrest, charge and caution were given, and he was remanded in custody to appear again in Court 44 on the 12th August 2005. Legal aid was granted and the Director of Public Prosecution gave an indication to the Court that he was directing summary disposal of the charges. On that date also, the applicant was admitted to bail in his own bond of €100 and was remanded to Balbriggan District Court on the 29th September 2005.

2. He appeared on that date before Judge Brophy, with his solicitor and counsel, and elected to be tried summarily in the District Court, and pleaded guilty to all charges.

3. It is averred in the affidavit of his solicitor, John Quinn, and this is uncontested before me, that on that date, the 29th September 2005, following the plea of guilty, Judge Brophy was given an outline of the facts of the case, and a plea in mitigation of sentence was given on behalf of the applicant by his counsel. It is averred also that having heard these matters, the District Judge *"having duly considered matters felt it appropriate to direct that the Probation and Welfare Service prepare a report",* and that the Judge remanded the applicant on continuing bail to appear again in Balbriggan District Court on the Thursday the 1st December 2005.

4. On that date, the 1st December 2005 he again appeared at Balbriggan District Court to find that a different judge was sitting, namely Judge Fitzpatrick. The Probation report which Judge Brophy had directed was available. Counsel on behalf of the applicant submitted to Judge Fitzpatrick that as pleas of guilty had been made to Judge Brophy and that he had heard the facts and called for a Probation Report to be prepared, that it was appropriate that the matter be put back to a date on which Judge Brophy could finally dispose of the matter. It is averred also that upon this application being made, Judge Fitzpatrick stated that Judge Brophy would not be back to that Court in the foreseeable future and that he would deal with the matter himself. This course of action was not something to which the applicant or his legal team consented. In fact they objected to that course of action. It is averred that the prosecution made no submissions in that regard.

5. Mr Quinn then avers that that despite the objection raised to Judge Fitzpatrick disposing of the matter, the judge proceeded to hear facts in relation to the offences, a plea in mitigation was made by the applicant's counsel, including by reference to the Probation report. It is averred that this report recommended that should the applicant remain at liberty that he should be returned to court after a short period so that he might be in a position to demonstrate that he has cooperated with, and acted upon the advice of the Probation and Welfare Service on a number of issues, and the officer indicated in that report that she would be happy to provide any further report on any other date set by the court.

6. In the event the District Judge imposed consecutive sentences amounting to a total of twenty two months, in circumstances where, it is averred, the District Judge could not have imposed sentences totalling more than twenty four months. The sentence can therefore be viewed as being at the top end of the range of sentencing available to the Court. It is averred that Judge Fitzpatrick himself did not at any stage consider jurisdiction, nor place the applicant on his election before sentencing, and that therefore he acted without jurisdiction.

7. Feichín McDonagh SC on the applicant's behalf has submitted that in circumstances where one judge has received the pleas of guilty, decided upon jurisdiction, and entered upon the sentencing/punishment process by hearing the facts of the case and a plea in mitigation, and has furthermore directed that a Probation report be obtained, it is a necessary fair procedure that the same judge consider the report and decide on the appropriate sanction. This is the argument based purely on fair procedures.

8. Mr McDonagh submits that as a matter of fair procedures alone the applicant is entitled to expect that he will be punished by the judge before whom he entered his pleas of guilty and who commenced the punishment process by hearing a plea in mitigation and thereafter requesting a Probation report. He submits that in the present case justice cannot be seen to be done and that a patent unfairness has occurred, the more so where objection was taken to the course taken. Mr McDonagh has referred the Court to a judgment of Kinlen J. in *Burns v. The Governor of St. Patrick's Institution Dublin*, unreported, 3rd February 1995. Appearing from that judgment, the facts were that the applicant pleaded guilty to certain offences before Judge Hussey who remanded him to another date on bail informing him that reports were to be obtained, and informed him also that if the reports were favourable she proposed to impose some community service by way of punishment, and if not she would impose a sentence of two months imprisonment. On the adjourned date the applicant appeared before Judge Windle who, not being impressed by the answers the applicant gave to certain questions designed to elicit from the applicant the extent of his knowledge of what community service entailed, proceeded to remand the applicant in custody so that he during that time learn what was the meaning of community service. In that regard, Kinlen J. stated the following:

> *"…It seems to me that this order was fatally flawed for a number of reasons. Firstly I think it a reprehensible practice for one judge to try the case and indicate the punishment and for another judge, who has not heard the case, to proceed to deal with the case by remanding the accused in custody to learn the meaning of words……I am quite satisfied that Judge Windle should have adjourned the matter to Judge Hussey."*

9. There are clearly some important factual distinctions between the facts of that case and the present one. Firstly, Judge Brophy gave no indication of what he proposed to do in the light of any report which he might receive. Secondly Judge Fitzpatrick certainly cannot be accused of acting towards the present applicant in the same unfair or "reprehensible" manner as was found to be the case

in respect of Judge Windle. As I read the judgment of Kinlen J. what was reprehensible was the remanding in custody to learn about community service, as opposed to entering upon a case commenced before another judge. In any event, I would not go so far in the present case as calling it "reprehensible" for Judge Fitzpatrick to have imposed sentence, since that term seems to imply some moral judgment upon the behaviour of the judge, which would not be justified in any way in the present case. I do not as a result feel that the Burns case is of assistance in the present case.

10. From a fair procedures point of view, it has been argued by Micheál P. O'Higgins B.L. on behalf of the respondent, that no constitutional unfairness has occurred, given first of all the context of a plea of guilty, and secondly, in as much as during the sentence hearing before Judge Fitzpatrick he heard the facts outlined to him, a full opportunity was both given and taken for submissions to be made in mitigation, the Probation report was read and considered by the judge, and he duly imposed a sentence which he was entitled to impose. He asserts that in an application for an order of Habeas Corpus in the face of a plea of guilty and sentence imposed there is a high hurdle to be overcome as far as the establishment of an unlawfulness of detention is concerned. He has referred to the comments of O'Higgins C.J. in *The State (McDonagh) v. Frawley* [1978] I.R. 131 at p.136 as follows:

> *" The stipulation in Article 40, section 4, subsection 1 of the Constitution that a citizen may not be deprived of his liberty save 'in accordance with law' does not mean that a convicted person must be released on habeas corpus merely because some defect or illegality attaches to his detention. The phrase seems to mean that there must be such a default of fundamental requirements that the detention may be said to be wanting in due process of law. For habeas corpus, therefore, it is insufficient for the prisoner to show that there has been a legal error or impropriety, or even that jurisdiction has been inadvertently exceeded.".*

11. Mr O'Higgins submits that in the present case, even if it is true that Judge Fitzpatrick ought not to have imposed a punishment where his colleague had embarked upon the sentencing process, it is a legal error or an exceeding of jurisdiction by inadvertence only, and not such as to invade the constitutional rights of the applicant, and that in those circumstances an order for the release of a convicted person should not be made.

12. Mr O'Higgins has also submitted that an estoppel operates so as to prevent the applicant making a case in respect of unfair procedures. He suggests that the applicant, through his legal team, did not at the hearing before Judge Fitzpatrick, reserve their position in relation to that judge proceeding with sentencing, and that they simply accepted the situation and made submissions in relation to mitigation and acquiesced in the process accordingly. He submits that at the least there should have been an express reservation as to the applicant's rights to challenge what was being done. I am not content that it would be appropriate to deal with this matter, affecting the liberty of the applicant by way of an estoppel argument. Either the applicant is in lawful custody or he is not, and it is not appropriate in my view for this court to reach a conclusion that maybe his detention is unlawful, but he only has himself to blame because he did not on the occasion when the matter of sentence was being dealt with utter the necessary reservation of his position through his legal team, who I am sure dealt with the matter as best they could at the time, not having expected that Judge Fitzpatrick would not remand the matter back to Judge Brophy.

13. Implicit in the applicant's submissions is a feeling that Judge Fitzpatrick imposed a sentence of more severity than may have been imposed had the matter come before Judge Brophy. But Judge Brophy gave no indication of what he proposed doing when he directed a Probation report. It follows that even if the sentence imposed was at the higher end of the range of sentences which the judge could by law impose, it was a permissible sentence, capable of being appealed against in the ordinary way on grounds of severity, and unfairness perceived to have taken place in the Burns case is not in the present case..

14. However, the applicant relies on a more fundamental point, namely one that District Judge Fitzpatrick lacked jurisdiction to impose sentence, or indeed presumably, any penalty, at all. The point made is that Judge Fitzpatrick himself gave no consideration to summary disposal pursuant to s.2 of the Criminal Justice Act, 1951; that it was Judge Brophy who did that and to whom the pleas of guilty were subsequently made; that accordingly the conviction occurred before Judge Brophy, and that the conviction and sentence are not severable events, but a unified process.

15. Mr McDonagh submits that there is just the one order of the District Court – a conviction and sentence, and one cannot have one Judge for the conviction and another judge for the sentence. In such circumstances, he submits that since the order is not severable, a finding that Judge Fitzpatrick had no jurisdiction to impose sentence means that both the sentence and the conviction itself must be bad.

16. Mr McDonagh has accepted, as he must, that there can be circumstances where one judge may have embarked upon a case and received a plea of guilty and adjourned the question of punishment for a Probation or other report, and by the time the adjourned date is reached that same judge may not be available either through serious illness or death. But even in such a situation of necessity, he submits that it is simply not possible for another judge to take up that case where his predecessor left off. Rather the trial process must be recommenced before the new judge, by that new judge in the first instance deciding on jurisdiction to deal with the matter summarily if he or she is so minded, putting the accused person on his or her election, inviting a plea of guilty or not guilty and so on, and proceeding either to a hearing of the case or imposing penalty depending on whether a plea of guilty or not guilty has been given by the accused.

17. In the present case, Mr McDonagh submits that any possible delay or administrative inconvenience involved in Judge Brophy returning to Balbriggan Court for this case was insufficient to confer jurisdiction upon or otherwise entitling Judge Fitzpatrick to lawfully complete a sentencing process which had already been embarked upon by Judge Brophy. Mr McDonagh submits that in these circumstances, Judge Fitzpatrick lacked fundamental jurisdiction and that his order for the applicant's detention is therefore bad.

18. The Court has been referred by Mr McDonagh to the judgment of Henchy J. in *The State (de Burca) v. O hUadhaigh* [1976] I.R. 85 in support of his submission that the conviction and sentencing is a single unified process. In that case a question arose as to the effect of a certain order of the then President of the High Court whereby he granted an order of certiorari in respect of an order made in the District Court, and whether the effect was to quash only the erroneous entry made in the court record relating to the sentence imposed by the District Justice, or whether in so quashing the entry relating to sentence, the conviction itself must also be regarded as quashed. Henchy J. was of the opinion that it had the effect in law of quashing both the sentence and the conviction. At p. 92 the learned judge stated:

> *"…For my part, I am satisfied that that is the correct interpretation of the law. We have been referred to a long line of judicial authorities, running back for over 200 years, which show that an invalid sentence cannot be severed from a conviction so as to validate a conviction on its own…… Since a conviction and sentence must stand or fall together, I conclude that the quashing of the sentences in this case also struck down the convictions."*

19. This is certainly conclusive of the view that if the sentence imposed by Judge Fitzpatrick is one made without jurisdiction, that fact has the knock-on effect of undermining fatally also the conviction. The question remains whether Judge Fitzpatrick was or was not acting within jurisdiction by acting as he did.

20. In that regard, Mr McDonagh has referred to the judgment of McCarthy J. in *Feeney v. District Justice Clifford* [1989] I.R. 668. That was a case where the respondent having heard an outline of the offences from a Garda decided that they were minor offences and fit to be tried summarily. The applicant elected for summary disposal and pleaded guilty. Only afterwards, but before sentencing, did the District Judge learn of certain facts which precluded him from imposing the two year sentence which he felt the offences merited. He therefore decided that the offences, though minor, were not fit to be dealt with summarily, and that the applicant should be sent forward to the Circuit Court. He therefore declined jurisdiction and adjourned the matter for a book of evidence.

21. That applicant failed in High Court in his bid for an order of prohibition, but prevailed in the Supreme Court. In his judgment in the Supreme Court, McCarthy J. (with which Finlay C.J. and Hederman J. agreed) contrasted two situations. The first being where a District Judge having had the facts of a case outlined forms the opinion that the offence is a minor one and enters upon a hearing during which he hears further evidence from which he is satisfied that in fact it is not a minor offence. In such a situation, McCarthy J was of the view that *"he must discontinue the summary trial and proceed in accordance with the provisions of the Criminal Procedure Act, 1967."* The second situation, contrasted with the latter, is where the District Judge decides that the case is a minor one, accepts jurisdiction to deal with the matter summarily, and thereafter receives a plea of guilty from the accused. In respect of such a situation, McCarthy J. states as follows at p. 678:

> *"If on the facts alleged, a district judge concludes that an offence is a minor offence fit to be tried summarily and the person accused pleads guilty……once he embarks upon an enquiry as to the penalty appropriate to the offence, in my judgment he is precluded from changing his mind. There is, in law, no such thing as a provisional conviction. Driven to its logical conclusion if it were otherwise, then without any plea of guilty a district justice might embark upon a summary trial, find the accused guilty, record a conviction and, then, on hearing a criminal record purport to 'vacate' the conviction, adjourn the hearing, extend the time for service of a book of evidence and make a return for trial of an accused to the Circuit Court to be tried before a judge and jury for an offence in respect of which he has already been tried and convicted in the District Court. Such cannot be the law." (my emphasis)*

22. Clearly in the present case there is no question of either District Judge having changed his mind as to the matter being one which is triable summarily. But, Mr McDonagh relies on this passage in order to highlight the sentence emphasised by me therein, namely that once the District Judge embarks upon an enquiry as to penalty he is precluded from adopting any different course. He submits that it follows that in the present case once District Judge Brophy had "embarked" upon the sentencing process he was engaged upon that process and that a point had been reached where he and he alone had seisin of the matter of sentencing, and that no other judge could finish that process without such other judge re-commencing the entire process. That would in his view entail any such other judge, and in the present case, Judge Fitzpatrick, himself forming the view that the offence was a minor one fit to be tried summarily, putting the accused again on his election, and in the event of the accused opting for summary disposal, inviting a plea of guilty or not guilty, and then upon the plea of guilty being offered, proceeding to embark upon the sentencing process. Mr McDonagh calls this judgment in aid of his submission that the conviction and sentencing is a unified process, incapable of severance either by the judge being able to change his/her mind after conviction/plea of guilty, or, as in this case, by one judge taking the plea of guilty (i.e. the conviction) and another judge completing the sentencing process, the same having been embarked upon by the first judge.

23. In response to the jurisdiction point. Mr O'Higgins has stated that he does not take issue with the applicant's submission that if the sentence imposed by Judge Fitzpatrick was to be quashed, this would have a knock-on effect for the conviction also – that both would fall. But he submits that this is not the point at issue in the present application for Habeas Corpus. It would be appropriate to judicial review proceedings for an order of certiorari on the basis that the judge had no jurisdiction to make the order which he made due to the involvement already by Judge Brophy in the matter of sentencing. In his submission, the applicant must show that the sentence order is bad. He also submits that the Feeney case is a case so distinguishable on its facts that it is not of assistance to the present applicant, since it was a case in which the District Judge in question had changed his mind about the matter and in effect reversed himself. Mr McDonagh had relied on that case for the purpose of showing that an embarking on the process of sentencing that course could not be halted prior to completion when the judge changed his mind as to the minor nature of the offence.

24. Mr McDonagh has referred also to the judgment of Henchy J. in *The State (Royle) v. Kelly* [1974] 259 by way of response to Mr O'Higgins reliance on the well-known passage from State (McDonagh) v. Frawley. In Royle, the learned Henchy J. states at p. 269:

> *"…The expression 'in accordance with law' in this context has an ancestry in the common law going back through the Petition of Right to Magna Carta. The purpose of the test is to ensure that the detainee must be released if – but only if – the detention is wanting in the fundamental legal attributes which under the Constitution should attach to the detention.*
>
> *The expression is a compendious one and is designed to cover these basic legal principles and procedures which are so essential for the preservation of personal liberty under our Constitution that departure from them renders a detention unjustifiable in the eyes of the law……It is the circumstances of the particular case that will usually determine whether or not a detention is in accordance with the law.*
>
> *Where as in the present case the prisoner has been convicted and sentenced by a court established by law under the Constitution, and the jurisdiction of that court to try the offence and impose the sentence has not been challenged, it would be necessary to show that the procedure has been so flawed by basic defect as to make the conviction a nullity before it could be held that the detention was not in accordance with the law." (my emphasis)*

25. Mr McDonagh points to the fact that in the present case the jurisdiction of Judge Fitzpatrick to sentence the applicant has been challenged, and that this goes to the fundamentals rights of the applicant such as to bring him within the principles of both State (McDonagh) v. Frawley, as well as The State (Royle) v. Kelly. He submits that what has occurred is not simply a procedural irregularity or deficiency which fell short of invalidating an essential step in the proceedings leading to the sentencing of the applicant. It is a matter rather that goes to the fundamental jurisdiction to make any order in the matter. Mr McDonagh submits that the onus of establishing that the applicant's detention is in accordance with law is on the State and that it has failed to discharge that onus.

26. An order for the release of the applicant must be made unless this Court is satisfied that the detention of the applicant is in accordance with law. The fact that the respondent may not have satisfied this Court in a positive way that the order for his detention is one made within jurisdiction does not end the matter and absolve the Court on an application for inquiry pursuant to

Article 40 from pursuing the matter further by its own inquiry. The matter is not dealt with solely on the basis of an adversarial contest between the applicant and the respondent. A passage from the judgment of O'Dalaigh C.J. in *Re: Application of Michael Woods* [1970] IR.154 at 162 is instructive in this regard:

> *"The principles which apply in litigation inter partes are not applicable in habeas corpus. The duty which the Court has under the Constitution of ordering the release of a person, unless satisfied that he is lawfully detained, requires that the Court should entertain a complaint which bears on the question of the legality of the detention - even though in earlier proceedings the applicant might have raised the matter but did not do so. The duty of the courts, to see that nobody is deprived of his liberty save in accordance with law, overrides considerations which are valid in litigation inter partes."*

27. Although stated in the context of an assertion that the applicant in that case ought to have raised the point at issue at an earlier application for habeas corpus, nonetheless the principle seems to be clear – namely that it is for the Court itself, if necessary by carrying out its own inquiry into the lawfulness of detention, to reach a conclusion in that regard irrespective of submissions made or not made by the parties. It is also a feature of applications of this kind that they are brought at very short notice to the other side and to the Court itself. In the present case the application for an order first came before me during the morning of Friday last the 2nd December 2005, the detention of the applicant having occurred on the previous day. I made the order sought, namely that the applicant be produced to the Court and his detention certified, returnable before me at 3.30pm on the same day, last Friday. It inevitably means that whatever Counsel is instructed to deal with the application on behalf of the respondent has very little time indeed, and appreciably less that Counsel for the applicant, to prepare himself/herself for the application. Indeed, that feature of these applications gave rise to a submission by Mr O'Higgins that it would be more appropriate for the applicant to seek a remedy, if his complaint was a valid one, by way of judicial review for an order of certiorari, so that the case could be dealt with in a less hasty manner given the importance of the issues raised. Given the very short time at his disposal last Friday given the shortness of the return, Mr O'Higgins is to be commended for the submissions which he was able to make. Nevertheless this Court was not by the time all submissions were completed in a position to have formed a decided view on the matter, and reserved its decision until the 5th December 2005 at 10am. I was not in a position to deliver judgment on that date, and was engaged on an official commitment outside the jurisdiction for the remainder of that week, and hence permitted the applicant to be released on agreed bail terms pending my decision.

28. O'Connor's Irish Justice of the Peace states at page 206 :

> *…Nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged… Therefore, apart from statute, a conviction made by justices should contain an express adjudication by the justices of every fact material to give them jurisdiction."*

29. In that regard I refer to the Warrant of Execution – Committal Warrant dated 1st December 2005 upon which the applicant is held in the respondent's institution. It recites *inter alia*:

> *"Whereas [the applicant] was this day before the Court charged [with the offences]*
>
> ** The accused having pleaded guilty*
>
> ** And whereas the Court was of the opinion that the facts alleged constituted a minor offence fit to be tried summarily and the accused on being informed by the court of his/her right to be tried by a jury, did not object to being tried summarily and the DPP having consented to the offence being dealt with summarily*
>
> *AND WHEREAS the accused has been convicted of the said offence and ordered to be detained for a period of [totalling 22 months]*
>
> *THIS IS TO COMMAND YOU TO WHOM THIS WARRANT IS ADDRESSED….."ETC.*

30. The wording of this warrant would certainly give the impression on its face that everything has taken place on the one day before the judge who has signed the order, namely Judge Fitzpatrick. It refers to the applicant being before the Court "this day" and "having pleaded guilty" and that "the Court" (presumably being "the Court on the 1st December 2005) "was of opinion that the facts alleged constituted a minor offence fit to be tried summarily", and it goes on to suggest that on that date also the applicant was told of his right to be tried before a judge and jury and so on. There is no reference to the fact that much of this happened on a different date and before a different District Judge. As is known, the formation of the opinion as to a minor offence, and the plea of guilty were referable to Judge Brophy.

31. The question which must arise is whether the reference to "the Court" can be interpreted as being "the District Court" as an institution, or whether it is confined to meaning "the Court presided over on the 1st December 2005 by Judge Fitzpatrick. If a wide interpretation is possible, then it may be possible to fit the present case's facts into a literal interpretation of the words used in the warrant even though it disguises the fact that much of what happened occurred before a different judge on a different date.

32. The question arising here really is whether the decision that an offence is a minor one, and one therefore fit to be disposed of summarily is one made by "the District Court" as opposed by the individual District judge, thereby enabling Judge Fitzpatrick to operate on the basis that he does not have to recommence *ab initio* and form that opinion himself before proceeding to deal with sentence, but rather can operate on the basis that this view has already been formed by the District Court. In this regard, Mr O'Higgins has referred to the fact that since the Courts Act, 1971 (s. 13 thereof) the District Court is a court of record.

33. As I have said I am satisfied that from a purely fair procedures point of view no infirmity exists since the applicant has not shown in what manner his right to fair procedures has been infringed since his counsel was able to make appropriate submissions in mitigation, the judge heard the facts of the case, read and considered the Probation report and arrived at his decision. It is also notable that Judge Brophy had not indicated an intention to impose any particular penalty. If he had done so, then the matter might well give rise to different considerations, but as things transpired I am satisfied that no unfairness leading to unlawfulness of detention has arisen on that ground. This latter point can be seen in play in *R v. Kiely* [1989] 11 Cr.App. R.(S) 273.

34. Neither can the fact that Judge Brophy called for a Probation and Welfare report be taken by the applicant as any indication that a particular penalty would be imposed by him in die course. Neither in my view had the applicant any legitimate expectation that the matter would be concluded by Judge Brophy. He will naturally have expected that it would be, but that is a different matter and not something to which he was entitled as of right.

35. Neither can it be said that simply because the applicant received what he considers to be a heavy sentence that it is an erroneous one. He had always of course the right to lodge an appeal against that sentence, and in that regard I notice that recognizances were fixed for that purpose.

36. There is no doubt that a view must be formed that the offence is a minor one and one fit to be tried summarily and that the accused person must be informed of his right to a trial by jury. That is specifically provided for in s. 2 (2) of the Criminal Justice Act, 1951 ("the 1951 Act") which provides:

> *"2. (2)(a) The District Court may try summarily a person charged with a scheduled offence if --*
>
> > *(i) the Court is of opinion that the facts proved or alleged to constitute a minor offence fit to be so tried, and*
> >
> > *(ii) the accused, on being informed by the Court of his right to be tried with a jury, does not object to being tried summarily." (my emphasis)*

37. I note in passing that s.1 provides:

> *"1.-- In this Act "Court" refers to any court exercising criminal jurisdiction, save where the context otherwise requires, but does not include courtmartial."*

38. Section 3 of the Act ( albeit repealed by the Criminal Procedure Act, 1967 "the 1967 Act") refers also to "the District Court" or "the Court" in relation to the procedure where an accused person pleads guilty in the District Court to an indictable offence.

39. The 1951 Act itself had repealed the equivalent provision contained in s. 77(B) of the Courts of Justice Act, 1924 ("the 1924 Act") which provided:

> *"77.-- The District Court shall have and exercise all powers, jurisdictions and authorities which immediately before the 6th day if December 1922 were vested by statute or otherwise in Justices or a Justice of the peace sitting at petty Sessions and also (by way of addition and not of exception) the following jurisdictions:--*
>
> > *A.-- In Civil Cases-- ……*
> >
> > *B.-- In Criminal Cases-- in any of the following cases, if the Justice shall be of opinion that the facts proved against the accused constitute a minor offence fit to be tried summarily and the accused (inquiry having been made of him by the justice) does not object to being so tried…" (my emphasis)*

40. In the *State (Hastings) v. Reddin* [1953] I.R. 134, Davitt P. considered s. 2 of the 1951 Act and stated at p.136:

> *"The Criminal Justice Act, 1951, s.2, sub-s. 2(a), provides that the District Court may try summarily a person charged with an indictable offence mentioned in the First Schedule to the Act if 1, the Court is of opinion that the facts proved that the facts proved or alleged constitute a minor offence fit to be tried summarily, and 2, the accused on being informed by the Court of his right to be tried with a jury, does not object to being tried summarily."*

41. It is noticeable from the terms of that Act that it was the District Court which gains jurisdiction in these circumstances rather than the particular District Justice. The District Court Rules, 1948 at Order 59 thereof on the other hand referred to the "District Justice" having jurisdiction to deal with the matter summarily, and it spoke of "the District Justice" proceeding to hear and determine the case. So there was the use in that Act of the term "District Court" and in the Rules applicable, to "the District Justice.

42. Davitt P. at p.138 of the same judgment states:

> *"Both the conveying of the information to the accused by the Court of his right to a jury and the absence of objection on his part to being tried summarily appear to me to be statutory conditions precedent to the exercise by the District Court of the jurisdiction conferred by the section." (my emphasis)*

43. Throughout that judgment the learned then President refers almost entirely to the "District Court" or "the Court".

44. As already adverted to, s. 3 of the 1951 Act was repealed by the 1967 Act, replaced by s. 13(2) of the 1967 Act which, as substituted by s. 10(3) of the Criminal Justice Act, 1999 now provides as follows:

> *"13. -- (1) …*
>
> *(2) If at any time the District Court ascertains that a person charged with an offence to which this section applies wishes to plead guilty, and the Court is satisfied that he understands the nature of the offence and the facts alleged, the Court --*
>
> > *(a) may with the consent of the prosecutor, deal with the offence summarily, in which case the accused shall be liable to the penalties provided for in subsection (3), or*
> >
> > *(b) if the accused signs a plea of guilty, may, subject to subsection (2A), send him forward for sentence with that plea to that court to which, but for that plea, he would have been sent forward for trial."*

45. Again one notices the reference to "the District Court". I also refer to the District Court (Criminal Justice) Rules, 2001 where in Order 24 (2) thereof it provides as follows under the heading "Summary disposal on a plea of guilty - DPP consenting":

> *"(2) Where an accused person is before the Court charged with an indictable offence with which the Court has jurisdiction to deal summarily if the accused pleads guilty the Director of Public Prosecutions consents, the Judge, on being satisfied that the accused understands the nature of the offence and the facts alleged, may deal with the case summarily if the accused pleads guilty and the Director consents."*

46. This Rule relates to s. 13(2) of the 1967 Act.

47. It seems to me that this rule and the section to which it relates permits of a situation where on one occasion the District Court has decided that the case is one which involves a minor offence fit to be tried summarily, and that at a later stage the judge (and not necessarily the judge presiding on the occasion when the opinion was formed that the offence was a minor one fit to be tried summarily) may deal with the matter on a plea of guilty and dispose of the matter by way of sentence or otherwise. In this regard s. 13 (2) of the 1967 Act refers to "the District Court" and "the Court". I appreciate that Order 24 (2) referred to refers to "the judge", but that expression is not necessarily related back to the judge who dealt with the matter initially for the purposes of s. 2(2)(a) of the 1951 Act.

48. I am satisfied that compliance with s. 2(2) of the 1951 Act confers jurisdiction upon the District Court and not any particular individual District Judge thereof in spite of the reference in the District Court Rules to "the judge".

49. In the present case there is no dispute about the fact that Judge Brophy complied with the requirements upon him under s.2 of the 1951 Act and that he formed the opinion that the matter was a minor offence and one fit to be tried summarily, and it is further not in dispute that the applicant herein when made aware of his rights and put on his election, and being fully legally represented and advised he must be taken as being aware of the facts alleged against him, pleaded guilty, and that thereafter certain submissions were made to Judge Brophy as to penalty and that the judge decided that a Probation and Welfare report should be obtained before any decision as to penalty. No indication was given as to what penalty was in the mind of Judge Brophy. He adjourned the matter and remanded the applicant to another date to await the said report.

50. On the 1st December 2005, it seems clear that the District Court had already lawfully obtained jurisdiction to deal with the matter summarily. In fact no submission to the contrary appears to have been made by the applicant's legal team if the contents of the grounding affidavit is a full account of what occurred. There was certainly, according to that affidavit, an objection voiced to Judge Fitzpatrick dealing with the matter of sentence/penalty on the basis that "as the pleas of guilty were entered before District Judge Brophy, and it was he who heard the facts and considered it appropriate that a Probation and Welfare report be obtained, it would be the proper course of action to remand matters back to him for ultimate disposal." But that is not a submission on the basis that the District Court no longer had jurisdiction to deal with the matter summarily.

51 I am satisfied that, on the 1st December 2005, by virtue of the provisions of s. 13(2) of the 1967 Act, and any rules made thereunder, the District Court had jurisdiction to dispose of the matter once the report was available. Once fair procedures were observed by way of the facts being outlined to the sitting judge and the appropriate and necessary opportunity to be heard in mitigation being afforded to the applicant and his legal team, there was no obstacle in my view to the matter being disposed of by Judge Fitzpatrick. It is of course the case that if there was a want of fair procedures in the constitutional justice sense then this Court should not hesitate to intervene to prevent a detention of the applicant which is not in due course of law, but in my view fair procedures were observed in this case and the detention of the applicant was made within jurisdiction and is in accordance with law.

52. I therefore refuse the relief sought.