

## THE HIGH COURT

2011 1493 SS

## IN THE MATTER OF SECTION 52 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS  
(AT THE SUIT OF GARDA JOE LOWNEY)

PROSECUTOR

AND  
FLORIN ROSTAS

DEFENDANT

AND

2011 1494 SS

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS  
(AT THE SUIT OF GARDA THOMAS O'MALLEY)

PROSECUTOR

AND  
JOHN MAUGHAN

DEFENDANT

## JUDGMENT of Mr Justice Michael White delivered the 31st of January 2012

1. These are cases stated by Judge William Early pursuant to the provisions of s. 52 of the Courts (Supplemental Provisions) Act 1961, for the determination of a question of law.

2. Both Florin Rostas and John Maughan have been charged separately pursuant to the provisions of s. 2 of the Criminal Justice (Public Order) Act 2011, which states:-

"A person who, while begging in any place –

(a) harasses, intimidates, assaults or threatens any other person or persons, or

(b) obstructs the passage of persons or vehicles,

is guilty of an offence."

Begging is defined in s. 1(2) as follows:-

"For the purposes of this Act, a person begs if –

(a) other than in accordance with a licence, permit or authorisation (howsoever described) granted by or under an enactment, he or she requests or solicits money or goods from another person or other persons."

3. In the course of the prosecution of both accused, the defence sought a direction, as the prosecution had not proved that the accused did not have a license permit or authorisation to beg.

4. The question posed by the learned judge in respect of *Director of Public Prosecutions v. Rostas* is:-

"In all of the preceding circumstances which arise in the context of a prosecution for an offence under Section 2 of the Criminal Justice (Public Order) Act 2011 must the prosecution adduce some evidence to show that the accused person did not act pursuant to license, permit or authorisation granted by or under statute, or is this evidence that the defence bears the burden of adducing?"

5. In *Director of Public Prosecutions v. Maughan*, the question posed was similar as follows:-

"In a prosecution for an offence under Section 2 of the Criminal Justice (Public Order) Act 2011 must the prosecution adduce evidence to prove that the accused person did not act pursuant to license, permit or authorisation granted by or under statute, or is this something that the defence bears the burden of proving?"

6. Section 2 cannot be construed without reference to Section 1(2). The act of begging in a public place carried out in an aggressive manner, is begging other than in accordance with a license, permit or authorisation granted by or under an enactment.

**The Burden of Proof**

7. The fundamental principle is set out in *Woolmington v. Director of Public Prosecutions* [1935] AC 462. Viscount Sankey L.C. at p. 481 stated:-

"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to statutory exception...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

8. There is no constitutional infirmity in transferring the burden of proof of an element of an offence to the accused. This is normally done by reversal of the burden, or by rebuttable presumption. There are many examples in Irish criminal statutes.

9. An example of a transfer of the burden is a charge pursuant to the provisions of s. 4 of the School Attendance Act 1926, for failure of parents to send their children to National School. Under the provisions of s. 17 (2) of the Act, a parent who does not comply with a warning notice is guilty of an offence unless he or she satisfies the court that he or she has used all reasonable efforts to cause the child to attend school and s.18(2) further provides that in a prosecution for an offence under the Act the burden of proof that there was a reasonable excuse for the non attendance of the child and that the child is receiving a suitable elementary education in some manner other than by attending a national or other suitable school rests on the person prosecuted.

10. An example of rebuttable presumption is set out at s.15 of the Misuse of Drugs Act 1977, as amended, when in a prosecution for possession of controlled drugs for the purposes of sale or supply the onus rests on the prosecution to prove possession, but there is a presumption of sale or supply unless the contrary is established by the accused.

11. The problem arises where there is either no statutory provision or the position is unclear, as in this Act. In those circumstances can a transfer of burden or rebuttable presumption be inferred? In English law it can be inferred in certain circumstances, and counsel for the D.P.P. has argued that this precedent should be followed here.

12. In *R. v. Edwards* [1975] 1 Q.B. 27, head note (2) p. 28 states:-

"That if on the true construction of an enactment, it prohibited the doing of a certain act, save in specified circumstances, it was not for the prosecution to prove a *prima facie* case of lack of excuse or qualification for the onus of proof shifted and it was for the defendant to prove that he was entitled to do the prohibited act and, accordingly, in the present case the defendant had to prove that he held a justices' licence."

13. In *R. v. Hunt* [1987] 1 AC 352 at 353, head note (1) states:-

"That the burden of proving the guilt of an accused was on the prosecution save in the case of the defence of insanity and subject to any statutory exception; that such exception might be express or implied and the burden of proof might be placed on the accused whether the exception appeared in the same clause of the instrument in question as that creating the offence or in a subsequent proviso and whether the offence was triable summarily or on indictment, and would be discharged on the balance of probabilities; and that where a linguistic construction did not indicate clearly on whom the burden of proof should lie the court might look to other considerations to determine the intention of Parliament, such as the mischief at which the provision was aimed and practical considerations such as, in particular, the ease or difficulty for the respective parties of discharging the burden of proof."

14. In Irish law there is no implied statutory exception, nor can the court look to other considerations to determine the intention of the legislature. Thus the principles set out in *R. v. Edwards* and *R. v. Hunt*, have not been followed here and are subject to some criticism in legal textbooks in England. See *Andrew & Hirst on Criminal Evidence* (4th Ed.) paras 3.34 to 3.39.

### **The Peculiar Knowledge Principle**

15. This is a long established principle of uncertain parameters, that where a matter lies within the peculiar knowledge of the accused, the prosecution is not required to prove it.

16. The principle is dealt with in *McGrath on Evidence*, paras. 2-30 to 2-37 beginning at p. 28, McGrath argues that while the principle was applied in *Minister for Industry and Commerce v. Steel* [1952] I.R. 304 that the application of the principle was restricted in subsequent Supreme Court judgments of *McGowan v. Carville* [1960] I.R. at 330 already referred to, and *Attorney General v. Shorten* [1961] I.R. 304. He further argues that it is now obsolete.

17. However the dicta of Murnaghan J. in *McGowan v. Carville* is still good law. The peculiar knowledge principle is restricted but not abolished. The law is accordingly well summarised at p. 345 of the judgment where Murnaghan J. stated:-

"It is a cardinal principle of the administration of the criminal law in this country, which has often been stated, and cannot be too often re-stated, that there is no onus on a person charged with an offence to prove his innocence, the onus at all times being on the State to prove his guilt. To this rule certain exceptions have been introduced by statute, mainly in the administration of the customs code, and there is I fear a regrettable but growing tendency on the part of the executive to promote legislation putting the onus of proving the having of lawful authority, in the shape of a licence, certificate or otherwise, on the person charged. It is necessary, in my view, that the Courts should steadfastly refuse to allow any unnecessary exception to the principle I have stated. At the same time the Courts must, as always, be careful to see that justice not only is done but shall appear to be done. The law in this regard, I think, tries to adopt a realistic and reasonable attitude. It recognises, in cases where the non-existence of lawful authority is alleged and the existence or otherwise of such lawful authority is in issue, that it may not always be possible, because of the nature of things, for the prosecution to prove affirmatively and beyond reasonable doubt the fact of the non-existence of such lawful authority. In such cases where sufficient evidence of the fact of non-existence has in the opinion of the judge or justice been given as the nature of the particular case would reasonably require the onus of proving the contrary is then said to shift to the person charged. In considering the amount of evidence necessary to shift the burden of proof in such a case the judge or justice would have regard to the opportunities of knowledge with respect of the fact to be proved which might be possessed by the parties respectively. This apparent exception to the general rule is to be found stated in Stephen's *Digest of the Laws of Evidence* (9th Ed., Art. 96), quoting the judgment of Salter J. in *Rex v. Kakelo* [1923] 2K.B. 793 at p. 795, and was adopted with approval by the Supreme Court in *the Minister for Industry and Commerce v. Steele* [1952] I.R.304."

18. The issue of licence, permit or authorisation is not a matter of legal defence. The prosecution are obliged to lead some evidence to establish a *prima facie* case that the begging took place without legal authorisation. Once this is established the burden of proof is transferred to the accused to establish a reasonable doubt as to the legality of the begging. It is a matter for the trial Judge to decide if a *prima facie* case has been established.

19. The answer to the question posed is "Yes". The prosecution must adduce some evidence to show that the accused person did not act pursuant to license, permit or authorisation granted by or under statute.