Neutral Citation Number: [2009] IEHC 289

THE HIGH COURT

2008 2030 SS

IN THE MATTER OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACTS, 1961 TO 1991

BETWEEN

TROY CREMIN

PROSECUTOR

AND

GARDA MICHAEL DINEEN

ACCUSED

Judgment of Mr. Justice Hedigan dated the 23rd day of June, 2009

1. This is a Case Stated by Uinsin MacGruairc, a Judge of the District Court, pursuant to s. 52 of the Courts (Supplemental Provisions) Act 1961 following a request by the private prosecutor in this case who initiated the prosecution as a common informer.

The Background Facts

2. Six summonses were issued on 16 June, 2008 on the application of the prosecutor. Five separate offences involve an allegation that the accused knowingly made a false report tending to show that an offence had been committed by the prosecutor on 12 April, 2007. The one remaining offence involves an allegation that the accused knowingly made a false report under Oath tending to show that a certain specified offence had been committed by the prosecutor. All the alleged offences are contrary to the same statutory provision, that is s. 12 of the Criminal Law Act 1976, which provides as follows: -

> "Any person who –
>
> (a) knowingly makes a false report or statement tending to show that an offence has been committed, whether by himself or another person, or tending to give rise to apprehension for the safety of persons or property, or
>
> (b) knowingly makes a false report or statement tending to show that he has information material to any inquiries by the Garda Síochána and thereby causes the time of the Garda Síochána to be wastefully employed,
>
> shall be guilty of an offence and shall be liable –
>
> (i) on summary conviction, to a fine not exceeding £500 or to imprisonment for a term not exceeding 12 months, or to both, or
>
> (ii) on conviction on indictment, to imprisonment for a term not exceeding 5 years."

3. The matters came before the District Court on 10 July, 2008 when the prosecutor opted for a summary trial in respect of the summonses. The accused's solicitor submitted that the offences were scheduled offences under the Criminal Justice Act 1951 and that as such his client had a right in law to elect for summary or indictable disposal of the charges, and further, that the accused was entitled to disclosure of the details of the offences alleged prior to the making of his election.

The Case Stated

4. The District Judge duly delivered a written judgment on the issues raised which set out his finding that Item 2 on the First Schedule of the Criminal Justice Act 1951 applied in that the offences in question related to a "form of obstruction of the administration of justice or the enforcement of law" and so the accused had a right to elect for trial on indictment. Section 2 of the Criminal Justice Act 1951 ("the 1951 Act") states as follows:-

> "(1) (a) In this Act, "scheduled offence" means –
>
> (i) an offence specified in the First Schedule to this Act, or
>
> (ii) an indictable offence declared to be a scheduled offence by an order under paragraph (b) for the time being in force.
>
> (b) The Minister for Justice may by order declare that any specified indictable offence shall be a scheduled offence.
>
> (c) … … …
>
> (2) The District Court may try summarily a person charged with a scheduled offence if –
>
> (a) the court is of the opinion that the facts proved or alleged constitute a minor offence fit to be so tried, and

(b) the accused, on being informed by the court of his right to be tried with a jury, does not object to being tried summarily.

(c) the Director of Public Prosecution consents to the accused being tried summarily for such offence."

Item 2 on the First Schedule of the said Act of 1951 describes the following matter as a "scheduled offence": -

"2. An indictable offence consisting of any form of obstruction of the administration of justice or the enforcement of the law".

5. Upon delivery of the judgment by the District Judge on this issue, the prosecutor requested that a case would be stated to the High Court for a determination on the questions of law that had arisen. That request was granted and the questions were formulated by the District Judge as follows: -

Question 1: Was the accused entitled to elect for trial on indictment?

Question 2: Is the accused entitled to advance notice of the material evidence in support of the six summonses issued against him?

The prosecutor's submissions

6. The prosecutor submits that the Criminal Justice Act 1951 was intended to capture a range of indictable offences in respect of which an alternative option of being prosecuted in the District Court would be provided. For an offence to attract the benefit of the 1951 Act and the right to elect for summary trial, it has to be an indictable offence. This is of critical importance to the application of the 1951 Act and that Act does not apply to offences other than indictable offences.

7. One of the scheduled offences listed in the First Schedule to the 1951 Act refers to the "obstruction" of the administration of justice. The prosecutor complains that the accused abused his powers and submits that that is not necessarily the same as obstructing justice. He argues that the accused is attempting to characterise the offence of making a false report as a scheduled offence so as to attract a right of election as to mode of trial. The prosecutor submits, however, that whether the offence relates to the obstruction of justice or not, it is a hybrid offence which is being tried summarily on his election. It is therefore not an indictable offence, and so simply cannot be brought within the ambit of the Schedule to the 1951 Act, which specifically only applies to indictable offences.

8. The prosecutor further submits that as the First Schedule to the 1951 Act obviously predates the Criminal Law Act 1976, which is the relevant Act for the purposes of the offences in issue, it cannot be said that the Schedule applies to the offences set out in the 1976 Act in the absence of any amendment of the 1951 Act or Ministerial Order showing that to be the case.

9. The prosecutor submits that the offences contained in s. 12 of the Criminal Law Act 1976 are what is known as "hybrid offences" in that they may be triable either summarily or on indictment at the discretion of the DPP and that the accused has no right of election in relation to this category of offences. He argues that the offences at issue in the case stated are "hybrid offences" being prosecuted summarily. Counsel for the prosecutor referred to an article appearing in the Judicial Studies Journal by Judge Thomas O'Donnell of the District Court entitled

"*Summary v. Indictable: Choices in the Disposal of Criminal Cases*" in which he stated: -

"If an offence is a hybrid offence, it only becomes an indictable offence once the prosecutor elects for trial on indictment. If the prosecutor elects for summary trial, then it is a summary offence and will be dealt with in the District Court, subject to the District Court determining that it is a minor offence."

And further: -

"The principal characteristics of these type of offences is that the Accused has no say as to whether he gets a trial in the District Court or before a judge and jury. This discretion rests with the DPP subject to the veto of the District Judge. It is in relation to these types of cases that most difficulty arises in the District Court."

10. O'Donnell D.J. also sets out a helpful list of examples of hybrid offences, all of which are set out in sections similarly worded to s. 12 of the 1976 Act. The prosecutor also refers to a passage appearing in Prof. Dermot Walsh's book *Criminal Procedure* (2002: Thomson Round Hall), at p. 11: -

"It is now common practice when a new criminal charge is being created by statute for the enactment to provide for maximum punishments which differ depending on whether conviction resulted from a summary trial or from trial on indictment. The choice between summary trial and trial on indictment in such cases would appear to lie with the prosecutor. If he opts for the former then the offence is summary and if he opts for the latter the offence is indictable."

11. Counsel for the prosecutor submits there is a fundamental difference between hybrid offences and offences triable either way in that the latter category of offences are indictable offences which may, depending on certain matters, end up being tried either summarily or on indictment whereas the former category of offences may be either summary or indictable offences, depending on the election of the prosecutor.

12. As offences triable either way are indictable offences, the s. 12 offence of making a false statement can not be said to be "an either way" offence because it is built into s. 12 that it may be a summary or an indictable offence, depending ultimately on the election of the prosecutor. Furthermore, indictable offences triable either way provide for a penalty on indictment and make no mention of summary trial or the penalty to be imposed following such a trial. The offence of making a false statement under s. 12 of the 1976 Act provides for a penalty following a summary trial and a penalty on indictment, again further indicating that it is a hybrid and not an indictable offence.

13. The prosecutor argues that there is no right to disclosure in a summary trial and that instead, a District Judge may exercise his or her discretion to direct that statements be furnished to an accused depending on the seriousness of the case, the importance of the statements/documents sought, whether the accused has already been adequately informed of the nature and substance of the accusation and the likelihood of injustice occurring if the statement/documents are not furnished.

The accused's submissions

14. The accused submits that an offence contrary to s. 12 of the Criminal Law Act 1976 consists of "a form of obstruction of the administration of justice or the enforcement of law" and is therefore a scheduled offence with the meaning of the 1951 Act. The accused relies on the UK case of *R v. Cotter* [2002] 2 Cr App R 29 which involved the offence of attempting to pervert the course of justice and submits that the investigation stage of the criminal process is included in or a part of the course of justice for the purposes of such an offence.

15. Both parties relied on the decision in *Bolger v. The Director of Public Prosecutions* (Unreported, High Court, Ó Caoimh J., 12 February, 2003) wherein Ó Caoimh J. held that assault contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997 was not an offence captured by Item 2 on the First Schedule to the 1951 Act, even though the assault was allegedly committed against a Garda acting in the course of her duty. In determining whether an offence is a scheduled offence or not, Ó Caoimh J. held that the court must look at the ingredients of the offence to be proved rather than the factual background of the case. Counsel for the accused says that the ingredients of the offence of making false statements amount to an obstruction of, if not the administration of justice, then the enforcement of law.

16. The accused also claims to be entitled to disclosure or advance notice of the evidence against him and relies on the decision of the Supreme Court in *Director of Public Prosecutions v. Gary Doyle* [1994] 2 I.R. 286 where it was held that an accused at all times retained his constitutional rights to fair procedures and that if it was in the interests of justice that statements of witnesses, or other evidence to be tendered by the prosecution at the trial be furnished to him, an order would be made directing that to be so. The test enunciated by the Supreme Court in *Gary Doyle* was such that disclosure should be ordered in the case of a person charged with an indictable offence who had elected for summary trial where the interests of justice required it.

The decision of the Court
In light of the authorities and extensive legal submissions referred to by counsel for the prosecutor, the court is of the view that the offence of making a false statement contrary to s. 12 of the Criminal Law Act 1976 is indeed what may be described as a "hybrid offence" and that as such it is a matter for the prosecutor to elect whether to proceed summarily or on indictment. As asserted by the applicant, it appears to be increasingly the practice of the Legislature when drafting a statute creating an offence to provide that the offence may be triable either summarily or on indictment at the discretion of the Director of Public Prosecutions. Judge Thomas O'Donnell, in his helpful article "*Summary v. Indictable: Choices in the Disposal of Criminal Cases*", also indicates that in the case of hybrid offences, the accused has no say as to whether he gets a trial in the District Court or before a judge and jury and that it is a matter for the prosecutor to decide.

17. I am not convinced that the decision of the English Court of Criminal Appeal in *R v. Cotter* [2002] 2 Cr App R 29, referred to by the accused, has any application to the facts of this case. In *Cotter*, the relevant offence was that of perverting the course of justice. Counsel for the accused placed emphasis on the finding by the court in *Cotter* that the investigative stage of the criminal process is included in "the course of justice". However, the important distinction to be drawn between this case and the *Cotter* case is that the offence in question in *Cotter* was not a hybrid offence. The offence in question in this case is not a scheduled, indictable offence triable either way and no right of election vests in the accused.

18. Where therefore in a case stated such as the instant one where the accused is charged with an offence which is a "hybrid" offence and the prosecutor has opted for summary trial, the accused has no choice in the matter and the case should proceed summarily subject to the District Judge considering that it is a minor offence fit to be tried summarily.

19. As regards the disclosure point, I was referred to the case of *Director of Public Prosecutions v. Gary Doyle* [1994] 2 I.R. 286 which concerned a person charged with an indictable offence who elected for summary trial; it does not apply to the facts of this case. In any event, in *Doyle,* the Supreme Court held that where an indictable charge was being disposed of summarily, there was no general obligation on the prosecution to furnish witness statements but that the court may direct, having regard to the interests of justice, such statements to be furnished and so it is clear that there could be no automatic obligation on the prosecution in a summary trial to make disclosure. However, I note that that the prosecutor has indicated that there are no witness statements in this case and has undertaken to make a précis of the evidence available to the accused before the trial.

Therefore the answer to the questions posed in the case stated are as follows: -

Question 1: No

Question 2: No