THE COURT OF APPEAL

Record Number: 116/2022

Edwards J. **Neutral Citation Number [2023] IECA 253**

McCarthy J.

Burns J.

BETWEEN/

T.L.

APPELLANT

- AND –

A JUDGE OF THE DISTRICT COURT AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Ms. Justice Tara Burns delivered on the 9th day of October, 2023.

1. This is an appeal against the judgment of the High Court (O'Regan J.) [2021] IEHC 765 dismissing the appellant's application by way of judicial review.

2. The appellant currently stands charged before the District Court, on foot of a charge sheet alleging sexual assault contrary to s. 2 of the Criminal Law (Rape)(Amendment) Act 1990 ("the 1990 Act"). The appellant instituted judicial review proceedings seeking *certiorari* of a decision of the District Court which refused to dismiss the charge sheet against the appellant and directed that the prosecution

proceed. He also sought an order prohibiting any further prosecution of that matter.

3. The order of the District Court which is sought to be quashed has not been exhibited in these proceedings so its exact terms are unknown. However, the import of the order is not in dispute between the parties.

Background

4. A complaint of sexual assault was made against the appellant on 20 July 2018 arising from an incident which was alleged to have occurred the previous day. Following an investigation by An Garda Síochána, directions were received from the respondent directing a prosecution against the appellant for an offence of sexual assault contrary to s. 2 of the 1990 Act, which matter was to be prosecuted summarily subject to the appellant's consent.

5. On 2 July 2019, the appellant was arrested at Bruff Garda Station where he attended by arrangement for the purpose of arrest, charge and caution. He was issued with a charge sheet in respect of the alleged offence returnable to Kilmallock District Court on 9 July 2019. He was granted station bail and was released. The appellant appeared in court on 9 July 2019 whereupon the matter was adjourned to 8 October 2019.

6. On 12 July 2019, the appellant received a summons by registered post to appear in Kilmallock District Court on 8 October 2019 in respect of the same alleged offence. The summons had been applied for on 15 June 2019 and was issued on 24 June 2019.

7. The appellant did not appear in court on 8 October 2019 due to a certified illness whereupon both the charge sheet and the summons

were adjourned to 11 November 2019. As a result of a change in representation for the appellant, matters were further adjourned on a number of occasions up until 22 January 2020 when the matter was again adjourned after a successful application for the appellant to be represented by Counsel.

8. On 28 February 2020, it came to the appellant's attention that the summons which had been served on him had been struck out on an earlier occasion. This was not within the appellant's knowledge and a further adjournment took place for enquiries to made in this regard.

9. Enquiries revealed that the summons had been struck out on 14 January 2020 on foot of an application on behalf of the respondent. This was a date when both the summons and the charge sheet were before the District Court and when an application for an adjournment was made on behalf of the appellant after the change in his legal representation was formally recorded before the court. The appellant and his solicitor were unaware of the application to strike out the summons on that date and accordingly did not make a submission to the court in relation to this course of action.

10. The covid crisis and certified illnesses on the part of the appellant intervened up until 20 November 2020 when an application was made on the appellant's behalf to dismiss the charge sheet. The application before the District Court, according to averments made by the appellant in his grounding affidavit, was based upon defects which were asserted to exist in relation to the summons procedure. The appellant avers that it was argued on his behalf that the dismissal of the summons denied his constitutional right to a fair trial and the right to defend himself against a charge which was brought on foot of a defective summons. This application was refused by the District Court on 22 January 2021. It is this order which is the subject matter of these judicial review proceedings.

The High Court

11. On 28 January 2021, leave to apply by way of judicial review for an order of *certiorari* of the District Court order of 22 January 2021, and an order prohibiting further prosecution in this matter was granted by the High Court (Meenan J.).

12. The grounds upon which this relief was sought were, in summary that:-

- the appellant's right to constitutional and natural justice, in particular his right to due process and fairness of procedure was denied;
- the appellant's right to liberty was denied;
- prosecution on the charge sheet was debarred as the charge sheet procedure could not be utilised when a summons was already in existence having regard to Order 17(1) of the District Court Rules 1997 ("the 1997 Rules");
- the appellant had a defence to the summons proceedings because of defects in the summons procedure which included a summons being utilised for the indictable offence charged and the summons being out of time contrary to s. 10(4) of the Petty Sessions (Ireland) Act 1851 ("the 1851 Act"). As the summons had been withdrawn, the appellant could not avail of these technical arguments which was in breach of his fair trial rights; and
- the appellant was charged with an offence unknown to law as sexual assault is an offence contrary to common law rather than contrary to s. 2 of the 1990 Act.

13. The matter came on for hearing before the High Court (O'Regan J) who delivered a written judgment in the matter on 1 December 2021. The trial judge held against the appellant finding that as the offence

at issue was an indictable offence, although being tried summarily, the time limitation provided for in the 1851 Act did not apply; the use of the charge sheet procedure was not legally prohibited pursuant to the District Court Rules; the appellant had not been charged with an offence unknown to law; having regard to the Supreme Court decision in *Kelly v. Director of Public Prosecutions* [1996] 2 IR 596, it was legally permissible to have a summons and a charge sheet in respect of the same offence in existence at the same time up until the actual trial of the offence provided that this did not result in an abuse of the right to a fair trial; and that the appellant's rights had not been infringed.

14. Two matters referred to in the High Court judgment were brought to the attention of the trial judge and this Court as being incorrect in the written judgment. Firstly, the trial judge had found that the appellant was out of time seeking leave to apply for judicial review. The respondent accepted that this was not the case having regard to the date of the determination by the District Court directing that the prosecution proceed, which was accepted by the respondent as being the relevant date for the purpose of bringing the leave application. Secondly, the trial judge was under the impression that the appellant wished to have the summons reinstated before the District Court so that arguments regarding the defects in the summons procedure could be made. This was not the appellant's position, which the respondent accepted.

15. The trial judge indicated that these two matters were inconsequential to her decision in the matter and affirmed her refusal to grant the reliefs sought.

Appeal before this Court

16. The appellant's appeal is against the entirety of the findings of the High Court. The arguments made before this Court by the appellant, who is unrepresented, are of a similar nature to what was argued before the High Court. Having made a preliminary objection to affidavit evidence filed by the respondent, the appellant submitted that the charge sheet procedure and the summons procedure could not co-exist; that he had been denied a fair trial as the summons procedure had been withdrawn before the District Court; and that he was unlawfully before the District Court resulting in a breach of his constitutional right to liberty. He submitted that the trial judge had been incorrect in her findings in this regard.

Preliminary objection to affidavit evidence of the respondent

17. At the commencement of the hearing before this Court, the appellant made a preliminary objection challenging the admissibility of an affidavit filed on behalf of the respondent which amongst other averments, explained why the charge sheet procedure was utilised when a summons had already been applied for. Garda Edel Moloney stated at paragraph 4 and 5 of her affidavit:-

> *"4. I say that a summons was applied for on 15th June 2019. However, due to an administrative error, no summons arrived to Pallasgreen Garda Station. It transpired that, unbeknownst to me, the summons was sent instead to District Headquarters and it was served on the applicant by registered post on the 18th July 2019…*
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> *5. As no summons arrived at the Garda Station to be served on the applicant, a decision was made to charge him with the offence, as provided for by Order 17 of the Consolidated District Court Rules."*

18. The appellant's challenge to the affidavit was twofold. Firstly, he relied on the fact that the affidavit had been sworn before a solicitor who had previously acted for him in the District Court proceedings, the subject matter of this application. The appellant had unsuccessfully made this objection before the High Court. Secondly, the appellant swore an additional affidavit after the conclusion of the High Court proceedings challenging the averments set out in Garda Moloney's affidavit, recited above, by referring to hearsay evidence. The appellant stated at paragraph 5 of his affidavit, *inter alia*:-

> *"I say I have made enquiries from a number of relevant sources and was informed that the procedure that now exists for summons delivery to Bruff Garda District is that all summons applied for are delivered to the Garda in Charge office in Bruff Garda Station, and served from that office on the person who is mentioned in the summons to answer the particular charge or charges directly."*

19. The appellant had not brought a motion seeking to adduce this new evidence before this Court. However, the respondent did not raise an issue in relation to this failure and agreed to the affidavit being considered by the Court.

20. I gave an *ex tempore* ruling on this preliminary objection on the first day of the hearing before us, with which the other members of the Court agreed. I determined not to deem inadmissible the impugned affidavit of Garda Moloney on the basis of the affidavit being sworn before a solicitor who previously represented the appellant, as the task being carried out by the solicitor did not conflict with his duty to his former client, the appellant. With respect to the new evidence which the appellant wished the Court to consider, in light of the respondent's position, the members of the Court were in agreement

that we would consider the additional affidavit of the appellant for the purpose of our deliberations whilst noting that the averments relied on by the appellant related to hearsay material.

Discussion and Determination

Can a charge sheet be proffered when a summons is already in existence in respect of the same alleged offence?

District Court Rules 1997

21. Order 17(1) of the 1997 Rules provides:-

> *"Whenever a person is arrested and brought to a Garda Siochana station, and is being charged with an offence or where an offence is alleged against a person who is already on remand to the Court and a summons in respect of the offence is not issued, particulars of the offence alleged against that person shall be set out on a charge sheet."*

22. The appellant submits that Order 17(1) prohibits the preferment of a charge sheet when a summons in respect of the same offence has already issued.

23. A literal interpretation of Order 17(1) does not prohibit the preferment of a charge sheet in circumstances where a summons has already issued in relation to the same alleged offence. Rather, Order 17(1) regulates the situation where a charge sheet is to be proffered on foot of an arrest or where an accused is already on remand before the court. In those circumstances, the Order requires that the charge sheet procedure be utilised rather than a summons being issued. However, the Order is silent in relation to the situation where a summons has previously issued in relation to an alleged offence and

it is now intended to proffer a charge sheet with respect to that same offence.

24. The fact that Order 17(1) does not prohibit the preferment of a charge sheet in circumstances where a summons has already issued in relation to the same alleged offence makes practical sense. The purpose of charging or summonsing an accused is to secure the attendance of that accused before the court. Use of the summons procedure requires service of the summons in the appropriate manner on the accused. Should service of the summons not be successful, the option to arrest and charge an accused, or charge an accused already before the court on remand, remains open. Serving a summons on an accused in circumstances where that person has been arrested for the purpose of charge, or is already before the court, would be a pointless exercise.

25. The summons in the instant matter had been issued prior to the charge sheet being proffered. Order 17(1) of the 1997 Rules plainly does not prohibit the use of the charge sheet procedure when a summons is already in existence. Accordingly, charging the appellant with the alleged offence when a summons was already in existence in relation to the same alleged offence was not prohibited by the 1997 Rules and the charge sheet proffered is not invalid by reason of the earlier issuance of the summons.

26. The trial judge did not err in finding that Order 17 of the 1997 Rules did not prohibit a charge sheet being proffered in circumstances where a summons was already in existence in relation to the same offence.

Can the summons procedure and the charge sheet procedure both be utilised at the same time?

27. The real question which arises for consideration in the instant matter is whether the summons procedure and the charge sheet procedure can both be utilised in respect of the same alleged offence at the same time.

28. In *Kelly v. Director of Public Prosecutions* [1996] 2 IR 596, the applicant had been issued with summonses in respect of a number of alleged offences, including dangerous driving simpliciter. Prior to the matter being dealt with in the District Court, the applicant was arrested and charged with dangerous driving causing death. The summons proceedings were withdrawn before the District Court and the proceedings instituted by charge sheet were returned to the Circuit Court. A technical defence was available in relation to the alleged offences commenced by summons in that the summons was out of time pursuant to s. 10(4) of the 1851 Act. The validity of this procedure was challenged by the applicant. The Supreme Court agreed with the reasoning and conclusion of O'Hanlon J in the High Court who had stated:-

> *"My overall view is that this does not appear to be a case where an element of estoppel exists such as existed in the Attorney General (Ó Maonaigh) v. Fitzgerald [1964] I.R. 458 or in the later decision in McCarthy v. The Commissioner of an Garda Síochána [1993] 1 I.R. 489. The State was in a position up until the applicant was acquitted or convicted to reconsider its decision and to fall back on the indictable charge if it saw fit to do so.*
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> *The law does not require the prosecution to be prohibited. It is reasonable to allow it to proceed. On the evidence, I am not satisfied that a case of mala fides or unfair or unconstitutional*

exercise of powers by the Director of Public Prosecutions had been made out."

29. *Kelly v. Director of Public Prosecutions* establishes that it is legally permissible for a prosecution to be instituted and maintained by both the summons and charge sheet procedure up to the time of acquittal or conviction provided that this power is not exercised in such a way as to constitute an abuse of the right to a fair trial.

30. The appellant seeks to distinguish *Kelly v. Director of Public Prosecutions* on the basis that a different offence was proceeded with by charge sheet in that case in comparison to the offence reflected in the summons. While a prosecution for an aggravated type of offence was instituted by way of charge sheet in *Kelly v. Director of Public Prosecutions* in comparison to the prosecution instituted by summons, that was not a distinguishing feature which permitted both procedures to be utilised. Additional proofs in respect of the alleged death would of necessity be required before the Circuit Court, however the circumstances of the alleged driving offence, namely dangerous driving, was common to both prosecutions.

31. The appellant relies on *Heaney v. Brady* [2009] IEHC 485 as authority for the proposition that both procedures cannot be utilised at the same time. Herbert J. stated at p. 4 of that judgment:-

> *"I find that the Charge Sheet procedure, the summons procedure under the Act of 1851, and the summons procedure under the Act of 1986, are simply alternative methods of procuring the attendance of an accused person before the court. In my judgment, a member of An Garda Siochana may avail of the Charge Sheet Procedure, either initially or where a summons issued by a District Judge or a summons issued by*

an appropriate District Court Office for the same alleged offences has not been served and has lapsed. A member of An Garda Siochana is not put to his or her election to adopt one of the three procedures and estopped thereafter from availing of another procedure where there is good and sufficient reason for the change, and provided always, that the procedures may not be availed of simultaneously."

32. With respect to the different legal conclusions asserted to exist between *Kelly v. Director of Public Prosecutions* and *Heaney v. Brady*, the most important consideration for me is that *Kelly v. Director of Public Prosecutions,* being a Supreme Court decision, is binding on this Court whereas *Heaney v. Brady,* being a High Court decision, is not. *Kelly v. Director of Public Prosecutions* determined that both procedures could be availed of simultaneously up to the time of trial at which point an election must occur. That decision is binding on this Court. In addition, the *ratio decedendi* of *Heaney v. Brady* must be carefully analysed. *Heaney v. Brady* involved a situation where the accused had initially been charged by the charge sheet procedure with a single summary offence. Having failed to turn up in the District Court after the charge was returned before the court, a bench warrant issued on that charge. Summonses were later sought, within time, in relation to five different offences arising from the same alleged incident. These summonses were not served and eventually lapsed. Charge sheets were subsequently issued which mirrored the offences alleged in the summonses. Having regard to this analysis of the facts, it is clear that *Heaney v. Brady* was not considering the situation where a charge sheet and an active summons were before the District Court, as is the position in the instant case. Accordingly, as this issue was not before the High Court, the comments by Herbert J in this regard are *obiter.*

33. Applying *Kelly v. The Director of Public Prosecution* to the instant case, it was permissible for the appellant to be issued with a summons and subsequently arrested and charged in respect of the same alleged offence. As no determination of any substantive issue took place on the summons procedure in the course of the various adjournments which occurred in the District Court, the withdrawal of the summons and continuance with the charge sheet procedure was also permissible subject to such action not resulting in a breach of the appellant's fair trial rights.

34. Accordingly, the trial judge was correct to find that *Kelly v. The Director of Public Prosecutions* was binding on her and did not err in finding that the procedure adopted in the District Court was valid.

Unfairness

35. The reason why both procedures were instituted was explained in the affidavit of Garda Maguire and has earlier been set out. As already referred to, the appellant has sworn an affidavit since the conclusion of the High Court proceedings averring to hearsay evidence which he asserts contradicts the sworn evidence of Garda Maguire. As the evidence which the appellant asks the Court to consider is hearsay evidence, it is inadmissible according to the rules of evidence as it does not fall within any of the exceptions to the hearsay rule. I am not satisfied to accept this evidence as establishing an untruth by Garda Maguire.

36. However, even had I been prepared to prefer this evidence over the sworn evidence of Garda Maguire, I fail to see how this would have rendered the simultaneous existence of the summons procedure and the charge sheet procedure unlawful. While *Kelly v. Director of Public Prosecutions* contains a proviso that the simultaneous existence of the two procedures must not impact on the fair trial rights of an accused, the most the hearsay evidence in this case could establish

is that the reason given for charging the appellant when a summons was already in existence was untrue. The appellant would still be in a position to avail of all of his fair trial rights before the District Court. Accordingly, the dispute on the facts which is alleged to have arisen does not have a significance in terms of my determination in this matter and I am satisfied on the evidence that there was no *mala fides* on the part of An Garda Síochána in adopting the course which was adopted.

37. The sole remaining question under this heading is whether the appellant's right to a fair trial has been impacted by the use of both procedures and the withdrawal of the summons. The appellant submits that his fair trial rights have been impacted as defects which he could have relied on in the summons procedure cannot now be availed of by him. Separate to whether defects existed in the summary procedure, which I will return to shortly, the legal position is that the respondent was required and entitled to elect which procedure she would proceed to trial with. In light of the legal requirement placed on the respondent to elect, the appellant could never have adopted the defects alleged in the summons procedure into the charge procedure as only one procedure could remain in being once matters of substance came to be determined. As the respondent chose to withdraw the summons procedure from the District Court, any argument relating to any defect therein was extinguished with that withdrawal.

38. For the sake of completeness, returning to the defects alleged in the summons procedure, the appellant alleges that the summons was out of time having regard to the provision of s. 10(4) of the 1851 Act which sets a six month time limit for the institution of proceedings in relation to a summary offence. A sexual assault is not a summary offence but rather an indictable offence which can be prosecuted

summarily pursuant to s. 12 of the Criminal Law (Rape) Act 1981, subject to certain conditions. Accordingly, pursuant to s. 7 of the Criminal Justice Act 1951, the six month time limit set out in the 1851 Act does not apply.

39. No other unfairness has been asserted by the appellant such as would render his right to a fair trial infringed by the procedure which has been adopted.

40. I am satisfied that the institution of the charge sheet procedure at the time a summons was in existence was legally permissible. I am also satisfied that the withdrawal of the summons and the continuance of the charge sheet procedure was legally permissible and that an unfairness does not arise for the appellant with respect to this process. The trial judge did not err in her conclusions in relation to these issues.

Other Complaints

41. The appellant complains that his right to liberty was infringed by use of the charge sheet procedure. As I have found that An Garda Síochána were legally entitled to arrest and charge the appellant despite the existence of a summons, his right to liberty was not affected.

42. The appellant also complains that he was arrested for an offence unknown to law in that the charge sheet refers to sexual assault contrary to s. 2 of the 1990 Act. He submits that sexual assault is an offence contrary to common law and that the 1990 Act merely provides the penalty for the common law offence. I do not agree that the appellant was charged with an offence unknown to law. However, these proceedings are not the appropriate venue to ventilate this

issue as this is a matter which falls within the jurisdiction of the District Court to determine in the course of the trial.

Conclusion

43. I am of the opinion that the District Court has jurisdiction to proceed with the charge sheet before it. The District Judge has not misapplied the law or acted in excess of or without jurisdiction. The trial judge was correct to refuse the appellant the relief sought for the reasons I have set out. I am therefore dismissing the appellant's appeal.