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THE HIGH COURT

1983 No. 232S.S.

IN THE MATTER OF AN APPLICATION
FOR PROHIBITION AND MANDAMUS

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

and

DISTRICT JUSTICE ROBERT O'HUADHAIGH

Respondent



JUDGMENT of Cannon, J., delivered the 29th July 1983

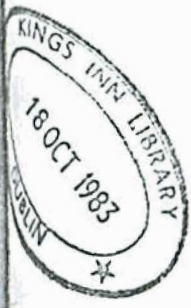
The applicant on this motion seeks orders of prohibition and mandamus directed to the respondent District Justice.

On the 28th February 1983 two adults were brought before the respondent District Justice sitting in Dublin Metropolitan District Court and there each was charged with an offence contrary to section 12 (1) of the Children's Act 1908 as set out in Charge Sheets 228 and 229 at Finglas Garda Station. On each charge sheet the word "defendant"

was deleted and each party charged was described as "accused". The word "complainant" was also deleted and Sergeant John G. Mulligan 20K the member of the Garda Siochana by whom the charges were brought was named as "prosecutor" on each charge sheet. The two accuseds were remanded on bail to the sitting of the District Court on the 14th March 1983. On that date they were granted legal aid and a solicitor was assigned to them and they were informed that they were entitled to be tried by jury if they so wished and both replied that they did not. Sergeant Mulligan informed the Court that "a file in the case was presently with the office of the Director of Public Prosecutions". The accuseds were remanded on continuing bail to the 28th March 1983 and 3.00 p.m. on that date was appointed for the hearing of the two prosecutions. It would seem that at that stage both the accuseds and the learned District Justice and Sergeant Mulligan assumed the charges would be dealt with as minor offences in accordance with the procedures of summary jurisdiction. On the one hand no reference was made to the preparation for service of the documents nor to the procedure prescribed in the Criminal Procedure Act 1967, but on the other hand the statement that the file was with the Director of Public Prosecutions indicated that Sergeant Mulligan had not a final

decision on the course to be taken. Although not so stated in the affidavits I infer that the fact that alternative procedures were prescribed for an offence contrary to section 12 of the Children's Act 1908 was not adverted to at that time, and to this may be attributed the misunderstanding which resulted in the present application.

Section 12 of the Children's Act 1908 provides in sub-section (1) that the offence created is a misdemeanour and a person guilty of such misdemeanour should be liable on conviction on indictment to a fine not exceeding £100 or to imprisonment for not more than two years and on summary conviction to a fine not exceeding £25 or to imprisonment for not more than six months. Sub-section (2) of that section provides that a person may be convicted of an offence under that section either on indictment or by a Court of summary jurisdiction notwithstanding the harm committed was obviated by the action of another person. Sub-section (3) of section 12 provides that a person may be convicted of an offence under that section either on indictment or by a court of summary jurisdiction notwithstanding the death of the child in respect of whom the offence is committed. Sub-section (5) makes further provision in respect of the offence or other circumstances in the event of a conviction either on indictment or on summary



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When the accuseds appeared before the respondent represented by their solicitor at the time appointed for the hearing on the 28th March 1983 Mr. Barry O'Donoghue a solicitor in the office of the Chief State Solicitor attended and informed the respondent that he represented the Director of Public Prosecutions who was the prosecutor. What took place then is described by Mr. O'Donoghue in his affidavit as follows:-

3. When the cases were called I informed the respondent that the applicant had elected to proceed by way of indictment.

4. The respondent adjourned the matter until 29th March 1983 to consider this information and the appropriate case law.

5. On the 29th March the respondent said the election of a venue was his function and not the applicant's and that he intended to proceed summarily on the 19th April 1983."

Upon that evidence the prosecutor obtained in the High Court on the 18th April 1983 a conditional order of prohibition and mandamus directed to the respondent District Justice "restraining him from proceeding summarily with the cases and ordering him to proceed by way of an indictment" unless cause shown to the contrary. The learned

District Justice does not show cause, but cause is shown on behalf of the two accuseds by the affidavit of their solicitor sworn on the 10th May 1983. In his affidavit he describes what took place in the District Court on the 28th and 29th March as follows:-

"(7) On the said occasion Mr. Donoghue indicated that the Director of Public Prosecutions was directing a hearing for a judge and jury. I, this deponent thereupon objected to the course being taken and submitted to the learned respondent that the Director of Public Prosecutions had no jurisdiction to decide for summary trial or trial on indictment. I say that I further submitted that it was for the Justice to decide whether the case was fit to be tried summarily and secondly for the accused to elect, upon the Justice being satisfied that the case was a minor offence, not to exercise his statutory right to trial by jury.



(8) The said learned respondent then required Mr. Donoghue to outline the facts of the case that is required by section 2 sub-section (2)(a) of the Criminal Justice Act 1951. The full facts of the case were outlined by both Mr. Donoghue and the common informant. The District Justice then decided that the case was a minor case fit to be tried summarily.

(9) The learned respondent then adjourned the case to the following day for the purpose of hearing legal submissions on the question of jurisdiction.

(10) Having heard legal submissions the said learned respondent required the common informant to be called in evidence and sworn which was done and the said common informant outlined the general facts of the case."

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The person referred to in the expression "common informant" is Sergeant Mulligan. From this description of the course of proceedings in the District Court it becomes understandable that whatever divergence was caused by misunderstanding on the 14th March 1983 widened into a significant rift. If the submissions set out at great length in the following eight paragraphs of the affidavit of the solicitor showing cause were made to the learned District Justice it was inevitable that an unbridgeable gulf was created. The matter was argued in the District Court on the assumption that the provisions of section 2 of the Criminal Justice Act 1951 were applicable. They have no application, and that this is so was acknowledged in this Court.

The matter was argued in this Court on the one hand on the assumption that the learned District Justice was arrogating to himself the function of determining whether the prosecutor should proceed by indictment or by summary trial, and on the other on the assumption that the prosecutor was arrogating to himself the function of determining a justiciable controversy on facts to found the jurisdiction of the District Court. It is my assessment of the evidence put before

this Court on affidavit that both of these assumptions are incorrect.

The jurisdiction of the District Court is not in issue. It is determined by legislation, and apart from section 2 of the Criminal Justice Act 1951 and the schedule thereto it does not extend to indictable offences. The offence created by section 12 of the Children's Act 1908 is one which is declared by the section to be a misdemeanour but may be triable either summarily or on indictment. It is competent therefore for a complainant or prosecutor to invoke the summary jurisdiction of the District Court for the trial of a charge preferred under that section. Alternatively, the complainant or prosecutor may proceed by indictment whereupon the procedure set out in Part II of the Criminal Procedure Act 1967 must be followed. Section 5(1) of the 1967 Act is ample for an offence such as is created by section 12 of the 1908 Act. Sections 7 and 8 of the 1967 Act set out the functions to be performed by the District Justice and sub-section (4) of section 8 is the only one pertinent to the issues sought to be argued on this application. It is obvious however, that a complainant or prosecutor being obliged to invoke either the summary jurisdiction of the District Court or the investigative functions of the District Justice preliminary to preferring an

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indictment must clearly indicate to the District Justice which function of the Court he is invoking. Perhaps over-familiarity with offences scheduled in the Criminal Justice Act 1951 and with offences clearly and only indictable or with offences triable summarily without alternatives gives rise to practices from which misunderstandings may develop in case of offences such as under section 12 of the 1908 Act which are triable under the alternative procedures.

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I am not satisfied that there was any attempt or intention on the part of the learned District Justice to compel the prosecutor to invoke the summary jurisdiction of the District Court and to forbear from proceeding by indictment. I am not satisfied the prosecutor was attempting to oust the jurisdiction of the District Court over a matter upon which that jurisdiction had been invoked in a regular manner. It seems to me the matter has been heavily clouded by zealous research into judgments of the Supreme Court and of the High Court in cases such as

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The State (McEvitt) .v. Delap 1981 I.R. 127, The State (McCann) .v. Wine 1981 I.R. 134, The State (Clancy) .v. Wine 1980 I.R. 228, The State (McEldowney) .v. Kelleher Supreme Court unreported 26th July 1983, Attorney General (O'Connor) .v. O'Reilly, the President, unreported

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29th November 1976, Clune and others .v. D.P.P. and Gannon, J.

unreported 13th March 1981, Costello .v. D.P.P. and Attorney General,

Gannon, J., unreported 10th February 1983, State (Collins) .v. Ruane,

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Gannon, J., unreported 8th July 1983. The parties appear to have

gone astray initially through omission to disclose to the Court that

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the Director of Public Prosecutions had charge of the prosecution and

that the matter could not proceed until he had decided whether to

invoke the summary jurisdiction of the Court or whether he would

serve the documents prescribed in section 6 of the Criminal Procedure

Act 1967 and proceed by way of indictment under that Act. I am

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informed he has not yet prepared these documents for service.

In the view I take of the evidence and the course of the

proceedings in the District Court and as they now are it seems to

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me that an order of prohibition and mandamus is not necessary and

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would be inappropriate. The matter, I believe, can proceed in a

regular manner upon the clearing up of the evident misunderstandings.

Accordingly, I will discharge the conditional orders.

G.G.
27/7/83



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