

THE HIGH COURT

1982 No. 1760P

BETWEEN:

PHILIP TORNEY

Plaintiff

-and-

IRELAND AND THE ATTORNEY GENERAL

Defendants

Judgment of Mr. Justice Costello delivered the 10th day of
May 1984.

The facts of this case and the issues involved in it can be briefly stated. On the 13th March 1981 the Plaintiff was arrested and charged with fraudulently converting to his own use a cheque for £9,376 contrary to the relevant section of the Larceny Act 1916. On the 22nd July 1981 he was sent forward for trial by order of the Dublin District Court to the Circuit Court sitting in Dublin. The Plaintiff wishes (for unexplained reasons as by agreement no oral evidence was given at the hearing) to have his trial heard in the High Court or alternatively by the Circuit Court sitting outside Dublin. He cannot apply for a transfer to the Central Criminal Court because section 32(1) of the Courts Act, 1981 repealed section 6 of the Courts Act 1964 under which an application for a transfer to the Central Criminal Court could have been made. And he cannot get a transfer to the Circuit Court sitting outside Dublin, because section 31(1) of the 1981 Act only allows a transfer application to be made when an accused is returned for trial to the Circuit Court sitting outside Dublin. On the 12th

February, 1982 he instituted these proceedings in which he asks the Court to declare that both section 32(1) and section 31(1) of the 1981 Act are unconstitutional. Section 32(1) infringes, it is said, Article 34.3.1 of the Constitution; section 31(1) infringes Article 40.1. I will deal firstly with the attack on section 32(1).

By Article 34.2 the Courts in which justice is to be administered are to comprise "Courts of First Instance and a Court of Final Appeal" and Article 34.3.1. makes provision for a Court termed a "High Court" in the following way:

"The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions of law or fact, civil or criminal".

It is urged on behalf of the Plaintiff that the effect of the impugned section 32(2) was to bar the route to a trial by the High Court of the offence with which the Plaintiff was charged because there is now no way in which the High Court could exercise jurisdiction in the matter. The case is put forward not on the basis that this has resulted in the breach of any constitutional right of the Plaintiff (such as, for example, a right of trial by a jury in the High Court as distinct from a trial by jury

in the Circuit Court) but on the basis that the Oireachtas by enacting the 1981 Act had infringed Article 34.3.1 by withdrawing a jurisdiction from the High Court expressly conferred on it by this Article.

To understand this argument let me look a little more closely at the pre-1981 situation. The High Court is constitutionally invested with full original jurisdiction in and power to determine all matters and questions civil or criminal and when exercising its criminal jurisdiction it is known as the Central Criminal Court (s. 11 of the Courts (Supplemental Provisions) Act, 1961). But the Constitution speaks of "Courts of First Instance", i.e. "Courts" in the plural and Article 34.4 provides that "The Courts of First Instance shall also include Courts of local and limited jurisdiction with a right of appeal as determined by law". The Courts (Establishment and Constitution) Act 1961 established another Court of First Instance called the Circuit Court (s.4 and this Court was given jurisdiction in criminal matters by the Courts (Supplemental Provisions) Act, 1961 (the "1961 Act"). By virtue of s.25 of the 1961 Act the Circuit Court

may exercise every jurisdiction as respects indictable offences for the time being vested in the Central Criminal Court but subject to subsection (2) of s. 25 which provides that this jurisdiction "shall not extend to treason, an offence under sections 2 or 3 of the Treason Act 1939, an offence under sections 6, 7 or 8 of the Offences Against the State Act, 1939, murder, attempt to murder, conspiracy to murder, or piracy, including an offence by an accessory before or after the fact". (Hereinafter "subsection (2) offences"). As the District Justice after holding a preliminary inquiry under the Criminal Procedure Act, 1967 is required to return an accused person for trial to the local Circuit Court except in cases where the accused is charged with a sub-section (2) offence, (or certain offences under the Genocide Act, 1973) this means that the High Court could only, unless there were cases transferred to it from the Circuit Court, exercise its criminal jurisdiction in a certain limited number of serious crimes.

But the Plaintiff makes no complaint of this situation as long as section 6 of the Courts Act, 1964 remained in force. This provided that if an accused is sent forward

for trial to the Circuit Court an application by the Attorney General (now the Director of Public Prosecutions) or the accused to the Judge of the Circuit Court before whom the accused is triable to have the trial transferred to the Central Criminal Court shall be granted if made after the giving of a seven days notice as specified in the section and, might be granted at the Court's discretion, if less than seven days notice was given. This meant that in respect of every indictable offence the High Court would be able to exercise its criminal jurisdiction in all cases tried on indictment if the transfer machinery was operated by the prosecution or the accused. But section 32(1) of the 1981 Act repealed section 6 of the 1964 Act. The transfer provisions in section 31 of the 1981 Act contain no power to transfer to the Central Criminal Court and only permit a transfer from the Circuit Court sitting outside Dublin to the Circuit Court sitting in Dublin. The result is that the only criminal cases which can now be tried in the High Court are the limited number of subsection (2) offences and these under the Genocide Act. This it is said, is constitutionally invalid because apart from the

trial of minor offences (which by specific constitutional provision may be tried in Courts of summary jurisdiction) the Oireachtas cannot take from the High Court the full original jurisdiction to determine all criminal matters conferred on it by Article 34.3.1.

This argument, it seems to me, does not correctly interpret the relevant constitutional provisions. The Constitution obviously envisaged the establishment of more than one Court exercising jurisdiction at first instance. It provided by Article 36 that subject to earlier provisions relating to the Courts the distribution of jurisdiction and business between the Courts shall be regulated by law. That is what the Oireachtas has done by the legislation to which I have referred. The Oireachtas has not deprived the High Court of its criminal jurisdiction - it has limited it to a certain number of categories of serious crimes and established other Courts of First Instance with jurisdiction over all other indictable offences. This seems to me to be permitted by the Constitution. Whilst the Constitution confers power on the High Court to exercise its criminal

jurisdiction over all offences it permits the Oireachtas to provide (a) that it should not exercise it in respect of every, non-minor offence, and (b) that instead another Court of First Instance should have jurisdiction over specified criminal matter

This interpretation of the provisions of Article 34 relating to criminal matters accords with the views of Mr. Justice McMahon (with which I respectfully agree) on the jurisdiction of the High Court in civil matters.

Ward v Kenehan Electrical Ltd. (unreported, the 21st December, 1979) was a case in which the Defendant applied to remit an action to the Circuit Court on the grounds that the damages to which the Plaintiff was entitled could not exceed the jurisdiction exercised by that Court. The Defendant countered the application by submitting that s.25 of the Courts of Justice Act 1924 (as amended) which conferred the power to remit was inconsistent with the Constitution, arguing that Article 34.3.1. gave to every citizen a right to have his case however trivial determined by the High Court. In rejecting this submission McMahon, J. said:

"In my opinion Article 34 section 3 cannot be construed as conferring a universal right of

recourse to the High Court for the determination of all justifiable disputes. The High Court is the only Court of First Instance expressly referred to in the Constitution but having regard to the fact that Article 34 section 4 provides for the establishment of other Courts of First Instance of local and limited jurisdiction the provision of section 3 which invests the High Court with full original jurisdiction can only be understood as referring to the extent of the jurisdiction which the High Court is capable of exercising. It cannot be construed as creating a right of access to the High Court for the determination of all matters and questions because Article 36 enables laws to be made for the distribution of jurisdiction and business among all the Courts which may be established under the Constitution including Courts of First Instance other than the High Court. It follows therefore that business which falls within the full original jurisdiction of the High Court may within the limits express and implied in the Constitution be assigned to some other Court". (Pages 4 and 5).

I was referred by the Plaintiff's counsel to Lynam v Butler (No. 2) 1933 I.R. 74; McAuley v Minister for Posts and Telegraphs (1966) I.R. 345; Buckley v Attorney General (1950) I.R. 67; In re. McAllister (1973) I.R. 238; Brown v Fearon 1967 I.R. 147; Attorney General v Bell (1969) I.R. 24; Director of Public Prosecutions v O'Shea (1982) I.R. 384; O'Brien v Manufacturing Engineering Co. Ltd. (1973) I.R. 334.

Whilst these cases helpfully throw light on the constitutional provisions relating to the Courts none ^{is} ~~are~~ directly concerned with the issue in this case and none ^{is} ~~are~~ in conflict with the views which I have just expressed. I was also

referred to a recent decision of Mr. Justice Gannon in R. v R. and the Attorney General (unreported, 16th February, 1984). But that was a case in which a question arose as to the power of the Oireachtas when making provision for a new jurisdiction for Courts of First Instance to deprive the High Court of all jurisdiction - a very different issue to the one which I am required to decide.

I must conclude therefore that section 32(1) of the 1981 Act is not constitutionally invalid.

I now come to the Plaintiff's second claim. This relates to section 31 of the 1981 Act which, as I have already explained, made provision for the transfer of criminal trials pending before the Circuit Court sitting outside Dublin to the Circuit Court sitting in Dublin but made no provision for the transfer of a trial pending in the Dublin Circuit to a venue outside Dublin. The provisions of the section were similar to those contained in the (repealed) s.6 of the 1964 Act, namely, a right to apply for a transfer was given to both the prosecution and the defence and the Court was required to grant the transfer if a seven-day notice was served -

otherwise it had a discretion in the matter. It is submitted that this section infringes Article 40.1. of the Constitution which provides that "All citizens shall, as human persons, be held equal before the law" in that a distinction is made in the section between accused persons who are sent forward for trial to the Circuit Court sitting outside Dublin, who may apply to have the trial transferred, and an accused who is sent forward for trial to the Dublin Circuit Court who cannot apply for a transfer outside Dublin.

The meaning of Article 40.1 has been made clear by the Supreme Court on more than one occasion. As was pointed out by Mr. Justice Walsh in Quinn's Supermarket v Attorney General (1972) I.R. p.1:

"The provision is not a guarantee of absolute equality for all citizens in all circumstances but it is a guarantee of equality as human persons and (as the Irish text of the Constitution makes quite clear) is a guarantee related to their dignity as human beings and a guarantee against any inequalities grounded upon an assumption, or indeed a belief, that some individual or individuals or classes of individuals, by reasons of their human attributes or their ethnic or racial, social, or religious background, are to be treated as the inferior or superior of other individuals in the community. This list does not pretend to be complete; but it is merely intended to illustrate the view that this guarantee refers to human persons for what they are in themselves rather than to any lawful activities, trade or pursuits which they may engage in or follow".

The distinction made in the section I am considering

between an accused person returned for trial to the Dublin Circuit Court and an accused person returned for trial to the Circuit Court sitting outside Dublin is not related to any difference based on the individual characteristics or qualities of accused persons in the different venues where the trial is to take place. It is based on entirely different considerations. The Oireachtas, it is clear, perceived a need to allow either the prosecution or an accused to obtain a transfer of a trial to Dublin where there is available a much larger number of persons qualified to act as jurors than would be available in venues outside Dublin, and where, accordingly, the likelihood of any possible prejudice which might affect the trial could be obviated. It obviously considered that the need to provide for a transfer outside Dublin did not arise. Its considerations were based on conclusions relating to the jury panels which would be created for trials (a) in the Dublin area and (b) outside Dublin, and were in no way related to the personality of accused persons. I fail to see how, by legislating in this way, the Oireachtas was in breach of its obligations under Article 40.1 of the Constituti

and I consider that the section is a perfectly valid one.

I must, then, dismiss both claims.

Approved

JL

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