

THE STATE (WILLIAM BUTLER)

.v.

DISTRICT JUSTICE JARLATH RUANE

Judgment of Mr. Justice O'Hanlon delivered the 5th day of May, 1986

In this case the Prosecutor was charged before the District Court on the 30th July, 1985, on the charge that "he did on the 21st June 1985 at North Wall Quay, a public place, attempt to get on/attempt to get into a mechanically propelled vehicle while it was stationary in a public place, contrary to Section 113 of the Road Traffic Act, 1961." He was convicted and the conviction is in the same terms as the Charge Sheet, the relevant part of which has already been recited.

The Prosecutor challenges the said conviction and claims that both the charge and conviction are bad for duplicity. In addition to proceeding in the High Court for relief by way of Order of Certiorari the Prosecutor has appealed against his conviction to the Circuit Court, and I was informed that that appeal is still pending.

In The State (Roche) .v. Delap, (1980) IR 170, a similar situation existed and Mr. Justice Henchy, with whose judgment the other members of the Supreme Court agreed, had this to say (at p. 173 of the Report):-

"The Prosecutor elected to appeal to the Circuit Court. There he allowed the appeal to be opened and did not contend that his conviction (as distinct from the sentence) was other than correct. While that appeal was pending, it was not open to him to apply for certiorari: see R. (Miller) .v. Justices

of Monaghan which shows that he should have elected either for appeal or for certiorari. It was not within the competence of the High Court to intervene by certiorari to quash a conviction and sentence when an appeal had not alone been taken to the Circuit Court but that appeal was actually in the process of being heard in that court."

As can be seen from that recital of the situation in Roche's case when the matter came before the Supreme Court, it was a more extreme case than the present one, where Notice of Appeal to the Circuit Court has been lodged, and presumably recognizances have been entered into for the prosecution of that Appeal, but the Appeal has not as yet come before the Circuit Court for hearing.

Nevertheless, unless and until the Supreme Court should modify the views expressed in Roche's case in such a way as to allow proceedings by way of certiorari to be brought concurrently with an appeal to the Circuit Court, which is left pending and awaiting a date for hearing, I consider that I am bound by what was said in that case to refuse relief by way of certiorari in circumstances such as obtain in the present case. In the case of R. (Miller) .v. Monaghan J.J., 40 ILTR 51, referred to in the judgment of Mr. Justice Henchy, the King's Bench Division in the persons of Lord O'Brien LCJ and Wright J. expressed the view quite clearly and without qualification that "where a person has taken an appeal and the appeal is pending certiorari does not lie."

For this reason I propose to allow the Respondent to amend the Notice showing cause why the Conditional Order should not be made absolute which has been served in this case, to include the additional ground now referred to, and to discharge the Conditional Order of Certiorari made herein and dated the 20th January, 1986.


R. J. O'HANLON.
5th May, 1986.