

THE HIGH COURT

[2020 No. 896 JR]

BETWEEN

STEPHEN FOGARTY

APPLICANT

– AND –

JUDGE OF NENAGH DISTRICT COURT, JUDGE OF NENAGH CIRCUIT COURT,
COMMISSIONER OF AN GARDA SÍOCHÁNA, DIRECTOR OF PUBLIC
PROSECUTIONS, MINISTER FOR JUSTICE, IRELAND, AND THE ATTORNEY
GENERAL

RESPONDENTS

JUDGMENT of Mr Justice Max Barrett delivered on 12th July 2021.

SUMMARY

This is an unsuccessful application for an order of *certiorari* in respect of an alleged illegality presenting in the fact that a District Judge accepted jurisdiction in certain criminal proceedings now pending against Mr Fogarty without asking Mr Fogarty if he wished to elect for jury trial. This summary forms part of the court's judgment.

1. The DPP has directed that Mr Fogarty be prosecuted summarily for (a) one count of assault causing harm (contrary to s.3 of the Non-Fatal Offences against the Person Act 1997), (b) one count of threatening and abusive behaviour (contrary to s.6 of the Criminal Justice (Public

Order) Act 1994) and (c) one count of resisting/obstructing a peace officer (contrary to s.19(3) of the Criminal Justice (Public Order) Act 1994). On 24th September 2020, the District Judge presiding in Nenagh District Court accepted jurisdiction and Mr Fogarty was remanded on continuing bail for hearing in the District Court. On Christmas Eve 2020, Mr Fogarty commenced the within judicial proceedings and has been granted leave to seek an order of *certiorari* “*quash[ing] the unlawful proceedings against me in Nenagh District Court*”.

2. Mr Fogarty’s application, in which he represented himself, focuses on a perceived denial of his right to a jury trial and, more particularly, on the fact that the District Judge who was presiding in Nenagh on 24th September last did not ask Mr Fogarty if he wished to elect for a jury trial. As offences (b) and (c) are summary offences, neither of which is electable, there is no question of a jury trial for those offences. So in truth Mr Fogarty’s complaint, to the extent that it can be made, can only be made in respect of the s.3 charge. (In passing, Mr Fogarty observed that when it comes to offence (c), the relevant charge sheet states “*Contrary to Section 19 of the [Act of 1994]*” without identifying the relevant sub-section. However, as counsel for the DPP rightly noted, when one reads the details of the offence charged, coupled with the reference to s.19 it is clear that what is being charged is a s.19(3) offence; this is accepted by the court).

3. Section 3 of the Act of 1997 provides, *inter alia*, as follows:

“(1) *A person who assaults another causing him or her harm shall be guilty of an offence.*

(2) *A person guilty of an offence under this section shall be liable –*

(a) on summary conviction, to [penalties stated]...or

(b) on conviction on indictment to [heavier penalties stated]”.

4. It is clear from s.3 that a s.3 offence can be prosecuted summarily or on indictment. The DPP, an independent State official, directed that Mr Fogarty be tried summarily on the s.3 charge facing him. The District Judge at Nenagh District Court, an independent judge, accepted jurisdiction. This process enjoys the sanction of the Superior Courts (see, *e.g.*, *DPP (Travers) v. Brennan* [1998] 4 I.R. 67). There is no provision in the Act of 1997 allowing one to elect for trial by jury of a s.3 offence. Additionally, it is well established in the jurisprudence of the Superior Courts that there is no general right of election in relation to hybrid offences (see, *e.g.*,

Reade v. Reilly [2010] 1 I.R. 295). Nor is a s.3 offence a scheduled offence under s.2(2) of the Criminal Justice Act 1951.

5. It is with the Act of 1951 that one gets to the nub of Mr Fogarty's concerns. The Act of 1951 did have the common law offence of 'assault occasioning actual bodily harm' listed (scheduled) in its First Schedule. Under s.2 of the Act of 1951, this meant that an accused could be tried summarily for same if he did not elect for a jury trial. However, the common law offence was abolished by s.28(1) of the Act of 1997.

6. What possible relevance do the statutory arrangements in respect of a once-extant and since-abolished common law offence have as regards the form of trial of a s.3 offence? Mr Fogarty maintains that the s.3 offence was enacted in substitution for the common law offence. And he contends that under ss.26 and s.27(1)(c) of the Interpretation Act 2005 the historical right to elect for jury trial in respect of the common law offence of 'assault occasioning bodily harm' now attaches to s.3 offences.

7. With every respect, Mr Fogarty's contentions make no sense as a matter of law. Section 26 has no relevance to the facts at hand. As to s.27(1), it provides that "*Where an enactment is repealed, the repeal does not – (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment*". Mr Fogarty contends that this includes a right under s.2 of the Act of 1951 to elect for jury trial in respect of a s.3 offence (which he perceives to be but the common law offence remoulded by statute from the same clay and hence somehow a continuing offence).

8. Mr Fogarty, with all respect, is wrong in his contentions. Yes, there was a common law offence known as 'assault occasioning bodily harm', and that offence was a scheduled offence listed in the First Schedule of the Act of 1951; however, this common law offence was abolished in 1997 and there can obviously be no right to a jury trial in respect of an offence that no longer exists. It just happens that in the Act of 1997, which extinguished the common law offence, the Oireachtas also created the s.3 offence. But that new s.3 offence is a freestanding, new, and separate offence. It may have similarities to the extinguished offence, it may to some extent fill the space in the criminal code that was left by the extinguishment of the common law offence; however, there has been no 'cross-pollination' of the s.2 right that

applied in respect of the scheduled common law offence such that it now attaches to the new (and never-scheduled) s.3 offence.

9. Mr Fogarty complains that the trio of charges against him involve alleged behaviour that could be charged as an indictable offence and suggested that the DPP has deliberately charged him with summary offences so as to ensure that he does not face a jury trial. The notion that the DPP would pick out Mr Fogarty from however many thousands of accused persons with whom she treats each year and do all she could to deny him a jury trial need merely be stated as a proposition to show how unreal it is. What possible reason could she have for doing so? More generally in this regard, the court respectfully adopts the following observations from the written submissions of counsel for the DPP as to the role of the DPP in directing summary trials and the related role of the District Court in accepting jurisdiction:

“The decision to initiate a prosecution and the subsequent conduct of a prosecution are functions exclusively assigned by the Oireachtas to the Respondent [DPP], who holds an independent statutory office. Once the Respondent considered that there was sufficient evidence to charge the Applicant with those offences and that the public interest required the pursuit of a prosecution, the Respondent had a duty to prosecute. The carriage of a prosecution is initially a matter for the respondent, who decides what charge, if any, should be prosecuted. It is also a matter for the respondent to decide, based on all the relevant evidence, whether the case ought to be tried summarily or on indictment.

*In this case, the Respondent directed that the applicant be charged with two purely summary offences and one hybrid offence to be tried summarily. That is an administrative decision which is only amenable to judicial review in limited circumstances which do not arise in this case. [The court recalls in this regard its own judgment in *Hanrahan v. District Judge Fahy* [2016] IEHC 266, para.27, as recently applied in *B.M. v. DPP* [2021] IEHC 332]. Once the respondent directed a summary trial, it was a matter for the District Court to decide whether or not it is a minor offence suitable to be tried summarily by the Court.*

In this case, the Court deemed this to be a suitable offence to be tried summarily and accepted jurisdiction”.

10. There is nothing unlawful in what has transpired thus far in the proceedings against Mr Fogarty and no basis for granting the relief sought.

11. Mr Fogarty mentioned at the hearing that he is struggling to find a solicitor who will represent him at his trial. He may wish to consider casting his net wider and seeing whether a solicitor from any of the cities of Dublin, Cork, or Limerick would be willing to represent him.

12. The court will hear the parties as to costs.