

**THE HIGH COURT  
JUDICIAL REVIEW**

[2021] IEHC 765  
[Record No. 2021/57 JR]

**BETWEEN**

**T.L.**

**APPLICANT**

**AND**

**A JUDGE OF THE DISTRICT COURT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENTS**

**JUDGMENT of Ms. Justice Miriam O'Regan delivered on the 1st day of December, 2021**

**Issues**

1. The applicant, a litigant in person, obtained leave on 22 March 2021 to maintain the within judicial review proceedings wherein he is seeking an order quashing the decision of the District Court of 22 January 2021, directing that the prosecution of the applicant on charge sheet number 20104849, under s.2 of the Criminal Law Rape Amendment Act 1990 as amended, should proceed.
2. No such order has been furnished to this Court.
3. The applicant also seeks an order of prohibition in respect of the further prosecution of the matter.
4. In the grounds relied upon to secure the relief sought the applicant pleads generally that his constitutional rights have been denied, in particular his right to due process and fair procedures. He also suggests that his right to liberty was denied although there is no evidence that the applicant was incarcerated at any time.
5. Events are outlined as follows:
  - (1) On 15 June 2019 the respondent applied for a summons.
  - (2) On 24 June 2019 the summons issued, however, in the circumstances issued to a Garda Station other than that which was dealing with the matter.
  - (3) On 18 July 2019 the summons was received by the applicant.
  - (4) On 2 July 2019 the applicant was arrested and charged on foot of a charge sheet.
  - (5) The return date for both the summons and the charge sheet was 8 October 2019.
6. By virtue of the foregoing the applicant complains from 8 October 2019 to 14 January 2020 the charge sheet and the summons were live, and this is said to be unlawful and unconstitutional.
7. In addition to the foregoing it is argued that:

- (a) notwithstanding that an indictable offence was included in the summons, same was statute barred;
- (b) the summons was withdrawn on 14 January 2020 without the applicant's knowledge (in submissions the applicant states that it was 2 March 2020 before he understood that the summons had been withdrawn);
- (c) the applicant relies on the decision of *S.M. v. Ireland* [2007] IEHC 280, to the effect that the offence is a common law offence and he should have been charged under common law rather than s.2 of the Criminal Law Amendment Act 1990 which comprises a further defect in the summons; and,
- (d) the asserted right or prejudice to the applicant was to the effect that if in advance of withdrawal of the summons on 14 January 2020 (when the respondent was permitted to withdraw the summons) he had been given notice and was in a position to argue the matter, he would have identified the foregoing defects which the applicant asserts are such that the case against him would have been dismissed as opposed to struck out whereupon it would have been impossible for the respondent to proceed on foot of the charge sheet.

#### **Time limits**

- 8. The respondent argues that the within matter is in breach of the provisions of O.84, r.21 of the Rules of the Superior Courts as the applicant delayed between 14 January 2020 and 20 November 2020 before making an application through counsel to reinstate the charge against him. In this regard although the application was made on 20 November 2020 the ruling of the District Court was on 22 January 2021.
- 9. The applicant states that he became aware of the withdrawal of the summons on 2 March 2020. Thereafter he waited until 20 November 2020 (without explanation for the delay) to seek to have the summons reinstated. The applicant is effectively relying on this delay to extend the period to seek judicial review which appears to me to be wholly unsatisfactory and in breach of the tenor of the Rules of the Superior Courts requiring expedition in relation to public law remedies brought by way of judicial review.
- 10. I am satisfied that this would comprise a factor to be taken into account in the exercise of my discretion if some one or more of the applicant's arguments are made out.

#### **The summons was out of date**

- 11. This argument is not sustainable based on the judgment of Ms. Justice Macken in *DPP (O'Brien) v. Timmons* [2004] IEHC 423 where it was held that an indictable offence retained its character as such even when dealt with summarily and was therefore not subject to the time limitations imposed on the prosecution of summary offences by s.10(4) of the Petty Sessions (Ireland) Act 1851.

#### **The charge sheet was unlawful**

- 12. In this regard the applicant relies on O.17, r.1(1) of the Rules of the District Court which provides:

“Whenever a person is arrested and brought to a Garda Síochána 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”.

13. I am satisfied that this provision does not preclude the existence of a summons and a charge sheet at the one time but rather requires a charge sheet in circumstances where a summons has not issued.

#### **Wrong charge on summons**

14. In *S.M v. Ireland* the offences under consideration was that of indecent assault from 1966 to 1976 when the applicant therein was charged under the Offences Against the Person Act 1861. It was in that context that the Court held that the offence remained a common law offence.
15. As the alleged offence herein occurred in 2018, the provisions of the 1990 Act applied, and the applicant has not therefore demonstrated that there was any want of authority in his arrest.

#### **Remaining issues**

16. The issues raised by the applicant have been the subject matter of judicial consideration in *Kelly v. DPP & anor.* [1996] 2 IR 596 being a judgment of the Supreme Court. The applicant therein was charged with a number of offences and the charges were instituted by way of District Court summons six months and one week after the date of the accident (outside of the period of s.10(4) of the Petty Sessions (Ireland) Act 1851). Before the summonses were dealt with the applicant was arrested and charged with dangerous driving and the summary charges were subsequently withdrawn. In a preliminary objection on behalf of the applicant it was argued that the prosecution on foot of the charge sheet had been instituted to circumvent the consequences of the failure of the DPP to prosecute the summary charge and the applicant sought prohibition of his trial.
  - 16.1 It was held that where two procedures are available, one to prosecute summarily, and the other to prosecute by way of indictment, only one may proceed to trial. The DPP was in a position up until the applicant was acquitted or convicted, to reconsider his decision and to fall back on the indictable charge if he saw fit to do so, provided that this power was not exercised in such a way as to constitute an abuse of the right of the defendant to a fair trial.
  - 16.2 It was further held that the decision of the DPP to prosecute by way of indictment did not conflict with any right of the applicant because although the summary proceedings had been instituted first, there had been no adjudication on any issue by the District Court and therefore no gain to the applicant of which he was deprived (per Murphy J. at p.608). The Court went on to state that all that can be put forward was that the summary proceedings were void and they would have been struck out on those grounds. Such a strike out would have been a “jurisdiction acquittal” and would not have created an estoppel in favour of the applicant.

- 16.3 The Court was satisfied that in the case before it there was no conviction on the summary charge which had not been heard and indeed the District Court did not have jurisdiction. The Court was satisfied that there was no element of estoppel to prevent the prosecution proceeding with the indictable charge.
17. The applicant refers to *Heaney v. Judge Brady & DPP* [2009] IEHC 485 a decision of Herbert J. at pp. 12 and 13 where the Court indicated that An Garda Síochána may avail of the charge sheet procedure either initially or when a summons issued by a district judge, or District Court office, for the same alleged offences had not been served and had lapsed. The paragraph concludes “provide[d] always, that the procedures may not be availed of simultaneously.” Herbert J. was dealing with a matter where the summons were not served and had lapsed and therefore it appears to me that his comments above should be seen in that context.
- 17.1 Furthermore, Herbert J. expressed the view at p.16 that in the absence of good and sufficient reason movement between the procedures should be discouraged, a statement not consistent with such movement being unlawful. Prohibition was granted on the ground of delay and not on the ground now raised by the applicant.
18. Insofar as the applicant argues that there is a conflict between *Kelly* and *Heaney*, it is the case that *Kelly* is binding on this Court.
19. The foregoing also disposes of the allegation that no right of the applicant was infringed in the circumstances.
20. The applicant’s relief is for the purposes of reinstating the charge against him, so that he could argue that it was void or invalid, such that it would secure a dismissal preventing the charge sheet indictment from continuing against him. However, as is clear from *Kelly* aforesaid this would amount to a jurisdictional acquittal and would not have created an estoppel in his favour preventing the charge sheet from continuing.

### **Conclusion**

21. There is Supreme Court authority to the effect that the charge sheet and a summons can exist in tandem but not beyond acquittal or conviction of the applicant.
22. It is inappropriate for the applicant to delay between 2 March 2020 and 20 November 2020 without explanation to enlarge his time within which he might maintain judicial review and in those circumstances if the applicant was entitled to an order of *certiorari* or prohibition which I find he is not, it would be an appropriate case to exercise a discretion against the granting of such a relief.
23. The reliefs claimed are refused.