

STATE (SHERRY)

THE HIGH COURT

1982 No. 694 S.S.

✓ 58

BETWEEN/

THE STATE (at the prosecution of DERMOT SHERRY)

Prosecutor

-v-

DISTRICT JUSTICE HUBERT WINE

Respondent



Judgment of O'Hanlon J. delivered the 18th day of March, 1983.

The Prosecutor appeared before the Respondent on the 25th November 1982 and 2nd December 1982 charged with the offence of having unlawful carnal knowledge of one, Lorraine Murtagh, a female, forcibly and against her will, contrary to Common Law and Sec.48 of the Offences Against the Person Act, 1861, and on the latter date was sent forward for trial charged with the said offence to the Circuit Court sitting in Dublin.

On the 14th December, 1982, a Conditional Order of Certiorari was granted by Gannon J., on the application of the Prosecutor, for the purpose of quashing the Order sending the Prosecutor forward for trial, unless cause were shown to the contrary within 21 days of the service of the Conditional Order.

The Conditional Order was granted on the grounds set out in the affidavit of Michael Hanahoe, Solicitor, who represented

the Prosecutor during the course of the said preliminary examination before the Respondent, and who deposed to the fact that he required the said Lorraine Murtagh, who was referred to in the charge brought against the Prosecutor, to attend before the Respondent to be examined by way of sworn deposition and for the purpose of cross-examining her in the course of the said preliminary examination.

The Respondent was only prepared to accede to the request to have the said Lorraine Murtagh attend for the purpose of making a sworn deposition on the application of the Prosecutor, on the basis that she would be examined in chief on behalf of the Prosecutor but would not be subject to cross-examination by the Prosecutor or his legal representative. The Prosecutor contends that the learned District Justice was wrong in law in making this decision and that the Order sending the Prosecutor forward for trial should be quashed by reason of this alleged irregularity in the manner in which the preliminary examination was conducted.

Cause has been shown why the Conditional Order of Certiorari should not be made absolute by Notice filed on behalf of the

Respondent by the Chief State Solicitor contending that the Respondent was correct in law in the ruling made by him.

Accordingly there is no conflict of fact as to what took place during the proceedings before District Justice Wine, and the only issue between the parties concerns the proper construction of the provisions of Sec. 7 (2) of the Criminal Procedure Act, 1967.

That sub-section reads as follows:-

"7 (2). The prosecutor and the accused shall each be entitled to give evidence on sworn deposition and also to require the attendance before the justice of any person whether included in the supplied list of witnesses or not, and to examine him by way of sworn deposition."

Mr. Carney for the Prosecutor argued that the practice prior to the passing of the 1967 Act always enabled the accused or his legal representatives to cross-examine any witness for the prosecution in the course of the preliminary hearing before the District Court and that in construing the provisions of Sec.7 of the Act of 1967 the Court should lean in favour of an interpretation which preserved the existing legal procedure so far as possible, while recognising the procedural changes intended to be effected by the Act.

I take the view, however, that the words of the sub-section

are clear and unambiguous, and should be applied literally according to the terminology used.

The Act was passed, inter alia, to do away with the laborious and time-consuming procedure which formerly existed under which the preliminary examination, (whose only purpose was to enable the District Justice to determine whether, in his opinion, there was a sufficient case to put the accused on trial for the offence with which he was charged), involved the taking of depositions on oath from all witnesses for the prosecution, which were then transcribed in long-hand in the presence of the accused and read over to the witnesses and signed by them.

Under the Act of 1967 the accused is furnished with a list of the witnesses whom it is proposed to call at the trial and a statement of evidence that is to be given by each of them, together with a list of exhibits (if any). On this material (coupled with some other formal documents) the District Justice now decides the issue in the great majority of cases, as to whether he should send the accused forward for trial or not. The right is preserved in the prosecution and the accused,

however, - if they think fit to do so, - to require that any witness or witnesses shall be called in the course of the preliminary examination to give evidence viva voce by way of sworn deposition, which is then taken down in writing, read over to him, and signed by him and by the justice.

Before any witness is called for this purpose, however, the initiative in calling him must be taken by the prosecutor or by the accused: The sub-section indicates very clearly that the party taking the initiative in this respect is to have the right to examine the witness by way of sworn deposition. Sub-section (3) provides that a witness who has been called in this manner and examined may be cross-examined and re-examined on his evidence. I take this provision as meaning that the party calling the witness is to conduct the examination-in-chief and the party on the other side is to have the right to cross-examine under such circumstances.

I conclude, accordingly, that the learned District Justice was correct in law in the ruling which he made, and I allow the cause shown against the Conditional Order of Certiorari, and

discharge same.

*R. J. O'Hanlon*

Approved. R.J. O'Hanlon

18/3/1983.

Note.

Counsel for the Prosecutor:- Paul Carney, SC; with him Greg. Murphy, BL, (instructed by Michael E. Hanahoe & Co. Solicitor)

Counsel for the Respondent:- Aindrias O'Cuiv, BL, (instructed by The Chief State Solicitor).

Cases and Materials referred to:-

People v. Daly, 83 ILTR 87/91.

Re Peacock, 12 Cox

Phipson on Evidence, 1982 (13th Edn.) Pars. 29.13; 29.17;  
34.24. Committee on Court Practice and Procedure, 1st Report,  
Par. 4

Maxwell, Interpretation of Statutes, 12th Edn.

The State (Shannon) v. DJ O'hUadhaigh, (1976) IR.

Criminal Justice Act, 1951, Sec. 9.

Criminal Procedure Act, 1967, Secs. 7, 14(1), 15.

S.R.O. 1961 No. 181, and Forms.

1947 Rules of District Court, R.55.