

1983 No. 673 SS

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STATE (M)

STATE (PAUL MURPHY) AND OTHERS



.v.

D.J. JOSEPH PLUNKETT

Judgment of Mr. Justice Barron delivered the 23rd day of FEBRUARY 1984.

The prosecutors were each convicted by the respondent at Dun Laoghaire District Court on the 21st November, 1983 that they did on the 31st October, 1983 unlawfully assault one Sergeant Ramonn Barry, a Garda, in the due execution of duty contrary to Section 12 Prevention of Crimes Act, 1871.

On the 24th November, 1983, the prosecutors obtained a Conditional Order of Certiorari to quash such convictions upon the ground that the section did not create an offence of assault in the particular circumstances but a penalty for an accused previously convicted of such an assault. Cause has been shown by the respondent against the making of the Conditional Order. The prosecutors notwithstanding such cause shown moved to have the Conditional Order made absolute.

The argument on behalf of the prosecutors is based upon the wording of Section 12 of Prevention of Crime Act 1871 in the context of that Act as a whole. Section 12 is as follows:-

"12. Where any person is convicted of an assault on any constable when in the execution of his duty, such person shall be guilty

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of an offence against this Act, and shall, in the discretion of the Court, be liable either to pay a penalty not exceeding £20, and in default of payment to be imprisoned, with or without hard labour, for a term not exceeding six months, or to be imprisoned for any term not exceeding six, or in case such person has been convicted of a similar assault within two years, nine months, with or without hard labour."

The prosecutors submit that no offence is committed unless the accused has already been convicted. The part of the Act in which Section 12 occurs is entitled "Punishment of Certain Offenders". Sections 10, 11 and 13 create offences in the usual manner by reciting acts the commission of which will constitute an offence the penalty for which is then set out. Sections 7, 8 and 14 as with Section 12 commence with the words "where any person - or in the case of Section 14, any woman - is convicted". It is submitted that since the provisions of Sections 7, 8 and 14 do not come into effect until a person has been convicted that similarly the provisions of Section 12 ought not to come into effect until the conviction has taken place. They then argue that the conviction is itself the offence for which the punishment set out in Section 12 is referable.

Section 7 creates four offences which can only be committed by persons

convicted of at least two crimes as defined by the Act and sentenced for the last of them within the previous seven years. Section 8 gives the Court power when imposing sentence upon a person similarly convicted to order supervision of the offender by the police. Section 14 gives the Court power when imposing sentence upon a woman similarly convicted to order her children under the age of fourteen to be placed in an industrial school.

It can be seen that the sections of the Act to which I have referred fall, save for Section 12, into two distinct categories. The former sections create offences for which particular punishments are specified, while the latter provide for additional consequences to arise in the case of a person with a second conviction.

The prosecutors rely upon the form of indictment for an offence under Section 7 of the Act in which the particulars of offence set out details of prior convictions. Section 7 is drafted similarly to Section 12 in the sense that it suggests that the conviction for one crime is an offence against the Act. Nevertheless such offence is committed not by virtue of the conviction, but by virtue of certain circumstances being established within the period indicated by the Section. No such further circumstances need to be established to give effect to Section 12. If Section 12 is read

in the manner contended for by the prosecutors it provides for a second punishment for the same offence since there is no suggestion in the Section that the penalty laid down is to be in substitution for any other penalty. This would go far beyond the scheme envisaged by Sections, 7, 8 and 14.

Section 12 itself provides for an increased maximum penalty in the case of a second conviction within two years. This lends support to a construction that the section creates an offence and sets out its penalties. Nevertheless I feel that the answer lies not so much in this ground of construction but in the expression "an offence against this Act". This expression is used for procedural purposes. Rule 2 of Section 17 is as follows:-

"The description of any offence against this Act in the words of this Act shall be sufficient in law".

Such expression is used in Section 7 and also in Sections 10, 11 and 13. It is not used in Sections 8 and 14 because no offence is created by those sections. Its use in Section 12 indicates that an offence is created by that section - that of assault on any constable when in the execution of his duty. The section should be read as being equivalent to:

"Where any person is convicted of an assault on any Constable when in the execution of his duty, such person shall be guilty of the

"offence of assault on a constable when in the execution of his duty,
and shall, in the discretion of the Court, be liable etc..."

This construction is also supported by the provisions of Section 2
of the Prevention of Crimes (Amendment) Act, 1885. This section provides
that Section 12 of the 1871 Act shall apply not to convictions for but to
cases of "resisting or wilfully obstructing any constable or peace officer
when in the execution of his duty". When read as I have indicated the section
is framed in the same manner as Section 47 of the Offences against the Person
Act 1861. That section creates a substantive offence: see State (O) .v. O'Brie
1971 Irish Reports page 42. Accordingly, I do not accept the submissions made
on behalf of the prosecutors. I will allow the cause shown and discharge the
Conditional Order.

Henry Barron

Henry Barron

23/2/84