

THE HIGH COURT

[2023] IEHC 207
[Record No. 2021/1038JR]

BETWEEN

SEÁN MCGONAGLE

APPLICANT

AND

**DISTRICT COURT FOR DISTRICT NO. 1 AND
THE DIRECTOR OF PUBLIC PROSECUTIONS**

RESPONDENTS

JUDGMENT of Mr. Justice Barr delivered on the 27th day of April, 2023.

Introduction.

1. The applicant was convicted and sentenced in the District Court on 14th September, 2021, for the offence of drunken driving. The second named respondent (hereinafter 'the DPP') concedes that in the circumstances, the conviction should be quashed by *certiorari*. The only issue that is live before the court, is whether the case should be remitted to the District Court for trial.

2. In these circumstances, it was the DPP who made the case that if the court granted an order of *certiorari* quashing the conviction, it should remit the matter back to the District Court. The applicant objected to that course of action being taken.

3. The court must determine two questions: first, whether the case is capable of being remitted at all, having regard to the principle of *autrefois acquit*. Secondly, if the court is of the view that the plea of *autrefois acquit* does not apply, the court must then determine whether to exercise its discretion pursuant to O.84, r.27(4) of the Rules of the Superior Courts, to remit the matter back to the District Court, having regard to all the circumstances of the case.

The Hearing in the District Court.

4. Evidence in the District Court was given by Sgt. John Joe McClafferty to the effect that he and another colleague had observed a vehicle parked on the roadside. The applicant was in the driver's seat, with the engine running. He stated that the applicant was wearing a baseball cap. He appeared to be asleep. He stated that when the Gardaí approached the vehicle, the applicant got out of the vehicle, appeared to be unsteady on his feet and had slurred speech. He then ran from the scene. The applicant was apprehended shortly thereafter. He was arrested and brought to Milford Garda Station, where a specimen of blood

was taken to be sent for analysis. This subsequently showed that his blood alcohol level was above the legal limit.

5. In the course of the hearing, the sergeant was challenged on his evidence in relation to the opinion that he had formed as regards the applicant's condition prior to arresting him. For the purpose of that cross-examination, the statement that he had made for the purpose of the prosecution in the District Court, was handed to the judge and he was questioned on matters that he had stated therein in relation to the forming of his opinion.

6. An application for a direction to dismiss the charge was made at the conclusion of the prosecution case, on the basis that the proper opinion had not been formed for the purposes of effecting the arrest. The learned District Court Judge ruled against that submission.

7. The applicant then gave evidence on his own behalf. He stated that he had driven to the location for the purpose of attending a party. He had pulled in to make a telephone call. That had been a distressing call. As a result, he stated that he had opened a bottle of vodka, that he had with him, which he had intended bringing to the party, and drank from it. He then turned off the engine of the car and pulled down his baseball cap and went to sleep. He stated that the engine only kicked back into action due to the fact that his battery was running low. He stated that he had not had any intention to drive the vehicle after making the telephone call and consuming the vodka.

8. The District Court Judge held that she was satisfied that the presumption that the applicant had intended to drive the car, had not been rebutted by him in his evidence. She stated that she did not have a reasonable doubt in relation to his intention to drive, or attempt to drive, at the relevant time.

9. The District Court Judge in giving her decision, set out that she believed that the applicant had left the scene in a panic, prior to being arrested, because of the fact that he had a previous conviction for a similar offence and that he was afraid of the consequences of being apprehended by the Gardaí.

10. The applicant's solicitor submitted that there was a concern that the court had relied on a reference to a previous conviction in the statement that had been made by the sergeant, when coming to her decision in the matter. The judge indicated that the reference to the previous conviction had been in the statement of Sgt. McClafferty and that was where she

had learned of it. No evidence had been given at the hearing that the applicant had a previous conviction, nor would any such evidence have been admissible.

11. The court then proceeded to convict the applicant. A fine was imposed. No evidence was given by the DPP of any previous convictions during the sentencing hearing that followed. It transpired that Sgt. McClafferty's statement in fact read as follows: "I recognised him then as a person that I had previously arrested for being drunk in charge of a vehicle in Letterkenny in 2006".

12. In his affidavit sworn on 6th December, 2021, for the purposes of this application, the applicant stated that he had been acquitted of the charge arising from the arrest referred to in Sgt. McClafferty's statement. He stated that he had not had an opportunity to tell the District Judge that, before she made her decision; nor had he had an opportunity to cross-examine any witness in relation to the suggestion that he had a previous conviction.

13. Given that the statement made by the sergeant had been introduced in evidence, solely for the purpose of cross-examining him in relation to the evidence that he had given to the court in relation to the formation of his opinion; and having regard to the fact that there was no evidence actually given to the court that the applicant had a previous conviction; such evidence not being admissible in relation to the charge then before the court; nor was he given any opportunity to cross-examine the witness on any of the other matters stated in his statement; the DPP did not oppose the granting of an order of *certiorari* in relation to the conviction that was imposed on the applicant as a result of that hearing.

14. The only remaining issue before the court, was whether it would be appropriate, having granted an order of *certiorari*, for the court to remit the matter back for rehearing in the District Court.

Submissions on behalf of the DPP.

15. Mr. Kieran Kelly BL on behalf of the DPP submitted that the issue as to whether there could be a remittal of the matter back to the District Court, depended on the nature of the hearing which had been invalidated. Where the lower tribunal had acted within jurisdiction, but had made an error in the exercise of that jurisdiction, which was sufficiently fundamental to warrant an order of *certiorari*, the grant of *certiorari* amounted to an acquittal. However, if a hearing was conducted without, or in excess of, jurisdiction, the resulting decision was void *ab initio*, such that the matter could be remitted once the decision had been quashed.

16. It was submitted that the case law had established that a plea of *autrefois acquit*, or *autrefois convict*, could not be established if it was based on an adjudication in excess of, or without, jurisdiction, since such an adjudication was void *ab initio*. However, where the order of *certiorari* was grounded upon the conduct of the hearing, rather than on a matter vitiating the jurisdiction of the tribunal in question, the quashing of a conviction of that tribunal amounted to an acquittal: see *Sweeney v. District Justice Brophy* [1993] 2 IR 202.

17. It was submitted that the relevant principles had been summarised by McKechnie J. (then sitting as a judge of the High Court), in *Stephens v. Connellan* [2002] 4 IR 321; see in particular, paras. 37 and 58.

18. Counsel submitted that even where a hearing was embarked upon within jurisdiction, it was possible for an error to be made by the judge hearing the matter, which was so serious, that the judge would thereafter be acting without jurisdiction. In other words, it was possible for a hearing to commence within jurisdiction, but for the judge to make an error that would cause him or her to lose jurisdiction: see *State (Holland) v. Kennedy* [1977] IR 193, where a 15 year old boy had pleaded guilty to an assault charge; whereupon, the District Judge had imposed a sentence of one month's imprisonment and issued a certificate under s.102(3) of the Children's Act 1908. He had imposed that sentence without making the preliminary finding that the child was of such an unruly character that detention in a place of detention provided for under the Act would not be suitable. Henchy J. held that the error in that case had been such as to divest the court of the jurisdiction which it had originally possessed.

19. Counsel submitted that the error in this case was equally grave, such that from the point where the District Court Judge had had regard to the content of the statement of Sgt. McClafferty and had relied on it informing her judgment, she had committed a grave error thereby divesting herself of jurisdiction. That meant that the proceedings were a nullity from that point onwards. Accordingly, it was submitted that the plea of *autrefois acquit* did not apply and the matter should be remitted to the District Court.

20. Counsel accepted that even where the special plea of *autrefois acquit* did not exist, the court still retained a discretion pursuant to O.84, r.27(4) of RSC, as to whether to remit the matter to the court, whence it had come.

21. Counsel submitted that the caselaw suggested that the following factors should be considered by the court when considering whether to exercise its discretion to remit: whether

the applicant had endured enough having regard to the length of the proceedings to the date of the application; whether the prosecution could be acquitted of all blame in the matter; the general passage of time; any period of imprisonment served by the applicant; and whether the offence was a serious one or a minor one: see *Sheehan v. District Justice Reilly* [1993] 2 IR 81; *Stephens v. Connellan* supra.

22. Counsel submitted that in this case, the following factors should persuade the court to exercise its discretion in favour of remittal: the DPP had not been responsible for the error made by the learned District Court Judge; the applicant had not served any time in prison; the offence with which he was charged was one of social concern and was therefore serious. It was submitted that in all the circumstances, it was appropriate for the court to make an order of *certiorari* in the matter, but to remit the matter back to the District Court for hearing by a different judge.

Submissions on behalf of the Applicant.

23. On behalf of the applicant, Mr. James Dwyer SC accepted that the law had been most recently comprehensively set down in *Stephens v. Connellan*. He also referred to a number of earlier cases, which had established that where the trial had been embarked upon within jurisdiction in the District Court, but where there had been some error made by the judge dealing with the matter, which had caused unfairness in the proceedings, that did not divest him of jurisdiction, but was regarded as an error within jurisdiction, which would warrant the granting of an order of *certiorari*. The significance of this, lay in the fact that in such proceedings the accused person remained in jeopardy and therefore once the conviction was set aside, the plea of *autrefois acquit* remained open to him to block any further prosecution for the matter: see *Sweeney v. Brophy*; *State (Keeney) v. O'Malley* [1986] ILRM 31; *Grennan v. Kirby* [1994] 2 ILRM 199; and *O'Brien v. DPP* [2019] IEHC 937.

24. It was submitted that the authorities were clear, that where a District Court trial began within jurisdiction, but exceeded jurisdiction as a result of unfairness, there could be no remittal for a retrial. It was submitted that the present case fell squarely within that category of cases.

25. Without prejudice to the foregoing, it was submitted that even if the court were to hold that the plea of *autrefois acquit* did not apply in this case, there was still a discretion vested in the court as to whether to order remittal pursuant to the rules of court. Counsel accepted the list of factors that had been proposed by the DPP in relation to the exercise of

the court's discretion, but stated that in addition thereto, it had been held that the fact that the defendant had had to reveal his defence, and had incurred costs in dealing with the matter, and the fact that where the parties seeking remittal, had made no objection (even of a formal nature) to the original order being made; these were relevant factors in considering the exercise of the court's discretion: see *Nevin v. Crowley* [2001] 1 IR 113; *Dawson v. District Justice Hamill (No. 2)* [1991] 1 IR 213; *Richards v. O'Donoghue* [2017] 2 IR 157.

26. In relation to the circumstances of the present case, it was submitted that the following factors should persuade the court to exercise its discretion against directing remittal of the matter to the District Court: there had been a delay in over 3.5 years since the date of the alleged offence; the applicant in giving evidence in the District Court had played his hand and revealed his defence; the applicant had incurred costs which would be set at nought in the event that a retrial was directed; while the offence was a serious one, it was far less serious than other offences in which the public interest would be greater in seeking a retrial; a conviction carried significant consequences for the applicant, in the form of a mandatory disqualification from driving, which was a significant consequence for someone leaving in rural Donegal; and submissions which had been made to the District Court in relation to the ruling on behalf of the applicant, which the DPP had since conceded were correct, had been opposed at the time in court by the prosecutor.

27. In summary, it was submitted that the applicant was entitled to avail of the plea of *autrefois acquit* which debarred the remittal of the case to the District Court. Even if the plea in bar was not available, it was submitted that the facts of the case were such as to warrant the discretion of the court being exercised to refuse the remittal.

Conclusions.

28. There has been some debate as to when the special plea of *autrefois acquit* applies. The decisions in the case law to date, suggest that it has been resolved in the following way: if the error was made within jurisdiction, but was sufficiently serious as to warrant an order of *certiorari*, the person on trial had been in jeopardy during the earlier proceedings and accordingly, was entitled to rely on the special plea of *autrefois acquit*.

29. On the other hand, if the error was one which caused the inferior court to go outside its jurisdiction, the proceedings were void *ab initio*, such that they were a nullity; which

meant that the person on trial was never truly in jeopardy and therefore the special plea was not a bar to remittal of the prosecution for a rehearing.

30. Even where the error was such that the court had acted without jurisdiction and therefore the plea of *autrefois acquit* was not open to an accused, the court still retains a discretion as to whether or not to remit the matter for a rehearing. This discretion is provided for in O.84, r.27(4) (formerly O. 84, r. 26(4)) of the RSC, which is in the following terms:

"(4) Where the relief sought is an order of certiorari and the Court is satisfied that there are grounds for quashing the decision to which the application relates, the Court may, in addition to quashing it, remit the matter to the Court, tribunal or authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the Court."

31. Having reviewed the authorities cited by counsel in argument, the court is satisfied that these establish that where a matter is properly embarked upon by a court acting within jurisdiction, but where in the course of the trial, the judge makes an error which results in the procedures becoming unfair, such error remains an error within jurisdiction.

32. In *State (Keeney) v. O'Malley*, the court had to consider whether the Circuit Court was entitled to re-enter an appeal, when at the hearing of a previous appeal before the Circuit Court in the same matter, the learned Circuit Court Judge had erroneously affirmed a conviction in the District Court, despite a submission by the prosecutor's counsel that the State had omitted an essential element of the case, being proof that the doctor who had taken the sample, was a registered medical practitioner.

33. In the course of his judgment on whether the learned Circuit Court Judge could embark upon a rehearing of the appeal, Lynch J. held that the only defect in the earlier appeal from the District Court, was the wrongful admission by the learned Circuit Court Judge of evidence in relation to the qualification of the doctor. He held that the Superior Court orders that had been made previously in the case, had held that the wrongful admission of the evidence, was of a sufficiently fundamental nature to warrant *certiorari*, notwithstanding that the learned Circuit Court Judge had had jurisdiction to try the appeal. Having referred to these matters, Lynch J. continued as follows:

"Nevertheless, being in the position where I have to choose as to whether the learned Circuit Court Judge was acting within jurisdiction but making an error in the exercise of his jurisdiction sufficiently fundamental to warrant Certiorari on the one

hand, or was acting in excess of, or without any jurisdiction on the other hand, it seems to me that this case falls within the first of these alternatives and, accordingly, that the effect of the previous Orders of the High Court and the Supreme Court amount to an acquittal."

34. In *Sweeney v. Brophy*, the applicant sought an order of certiorari in respect of his conviction in the District Court for common assault, on the grounds that the conduct of the trial by the learned District Court Judge had been fundamentally flawed. In particular, the judge had unilaterally invited the prosecution to treat its own witness as hostile; had threatened to jail the witness for contempt for giving evidence inconsistent with the statement made by him to the Gardaí; and had ruled evidence called by the applicant to be inadmissible, without any possible justification. The Supreme Court held that a plea of *autrefois acquit*, or *autrefois convict*, could not be established, if it was based on an adjudication in excess of jurisdiction, or without jurisdiction, since such an adjudication was void *ab initio*; but where an order of *certiorari* was grounded upon the conduct of the hearing, rather than a matter vitiating the jurisdiction of the tribunal in question, the quashing of a conviction of that tribunal, amounted to an acquittal. The court went on to hold that in the case before it, the first respondent had been acting within jurisdiction and had not lost his jurisdiction by the way the trial had been conducted; but the proceedings had been so fundamentally flawed as to entitle the applicant to have his conviction quashed and to plead *autrefois acquit*.

35. In *Grennan v. Kirby*, the District Court Judge had refused an application by the accused's solicitor at the outset to adjourn the hearing of the matter, so as to enable the accused to retain the services of counsel. That application had not been opposed by the prosecution. Nevertheless, the District Court Judge had refused the application and had proceeded with the hearing. In the High Court, Murphy J. held that the action of the District Judge in refusing to adjourn the trial, with the consent of the prosecution, to enable the applicant's solicitor to instruct counsel, was of such a nature as to deprive him of jurisdiction to enter upon the hearing of the matter. As the order and conviction were a nullity; there was nothing to prevent the matter being proceeded with afresh in the District Court.

36. The parties were agreed that the seminal judgment in this area was the judgment delivered by McKechnie J. in *Stephens v. Connellan*. Having set out the general principles in relation to remittal following the grant of an order of certiorari at para. 37, the learned judge

went on to review the case law in relation to the circumstances in which various errors made by a judge hearing a matter, will be held to be within jurisdiction, or outside jurisdiction. Having noted that it was not altogether easy to bring together a set of principles which emerged from the cases that he had reviewed, he stated that by way of generality, the following principles appeared to apply:

"(1) That if the error which attracts certiorari is one made by a court or tribunal acting without or in excess of jurisdiction, then the resulting adjudication and order are both a nullity. In such circumstances the law takes the view that the accused person was never in lawful jeopardy or in lawful peril and consequently the order itself of the superior court(s) is no bar to a continuation of the existing proceedings or to a re-issue of the same charges. The special plea is not available.

(2) Phrases such as "without jurisdiction", or "want of jurisdiction", or "in excess of jurisdiction", or others in like vein have been used interchangeably to convey a situation where not only has jurisdiction never existed but also, though originally in place, has been lost or forfeited at any time during the judicial process.

(3)(a) That if the impropriety complained of was made within jurisdiction, but was such as to attract an order of certiorari, an accused person would be considered to have been in lawful jeopardy or peril and as a result would be entitled to the special plea of autrefois acquit.

[...]

*(5) The making of O. 84, r. 26(4) in 1986, given the limitations imposed on the Rules Making Committee, did not alter the general principles applicable to the retrial of an accused person, which principles, for present purposes, continue to be governed by cases, such as *The State (Tynan) v. Keane* [1968] I.R. 348, *The State (de Burca) v. Ó hUadhaigh* [1976] I.R. 85 and *Hamill v. Director of Public Prosecutions* (Unreported, High Court, Barrington, J., 18th May, 1983) etc. Accordingly where the special pleas are available, such pleas in themselves and without more determine the issue there being no question of the court having or having to exercise any discretion.*

(6) Where a special plea is not available the order of certiorari in itself is not a bar to a continuation of the existing proceedings or the institution of fresh proceedings.

(7)(a) *In but only in the circumstances last mentioned there is now under the aforesaid order and rule a discretion in the court to remit (see Coughlin v. Judge Patwell [1993] 1 I.R. 31) as of course there always was on the authorities whether to continue or not.*

(b) *However, the vesting of this discretion being that mentioned in the paragraph immediately preceding, carries with it, quite evidently, an entitlement to refuse to remit and thus in that way bring to a conclusion the proceeding against an accused person (see Sheehan v. District Judge Reilly [1993] 2 I.R. 81).*

(c) *In the exercise of this discretion the court will consider the justice and fairness of remitting and will do so in the context of the particular facts applicable to each individual case, including the conduct of all the parties or persons involved in that case.*

(d) *In addition to O. 84, r. 26(4), this discretion may have a more general basis in broad fairness principles and in constitutional justice.*

(8) *If the above be correct, the crucial question centres on the court's determination of when and in what circumstances an error, sufficient to set aside an order, is one made within or in excess of jurisdiction. The phrase (referable to the conduct of the hearing), as used by Walsh J. in *The State (Tynan) v. Keane* [1968] I.R. 348, when indicating the type of impropriety which would be considered within jurisdiction, must now be looked at in the context of what Henchy J. said in *The State (Holland) v. Kennedy* [1977] I.R. 193 and what was said in other later and similar cases, it being now clear that in addition to a court or tribunal never having had jurisdiction, such a forum may at any stage of the process lose its jurisdiction.*

(9) *However, there remains a wide divergence of judicial views as to what correctly should be described as an error made within jurisdiction as distinct from an error made in excess of jurisdiction. Whilst for the purposes of certiorari this may no longer be of such crucial importance, yet on the issue of remittal it remains a point of major significance.*

[...]"

37. Finally, more recently, in *O'Brien v. DPP*, Meenan J. applied the principles set down in *Sweeney v. Brophy* and *Stephens v. Connellan*. In that case, the District Court Judge had excluded the applicant from the court for a period of time and during that time the

prosecution had proceeded and where the judge had convicted the applicant and sentenced him to concurrent terms of five months imprisonment. Meenan J. had held in a previous judgment that while the hearing had been conducted before a court of competent jurisdiction; for the reasons set out in the judgment, the applicant had been deprived of a fair hearing.

38. Meenan J. went on to state in his second judgment that, applying the passage cited from Hedderman J. in *Sweeney v. Brophy*: "*The trial can properly be categorised as one that has not been held in due course of law and any conviction arising therefor should be quashed so as to entitle the defendant to plead "autrefois acquit".*" He held that in the case before him, an order of certiorari had been granted by reason of the conduct of the hearing of the prosecution and was not referable to an issue vitiating the jurisdiction of the District Court. Accordingly, he ruled that the applicant was entitled to rely on the special plea of autrefois acquit. Therefore, he refused to remit the matter to the District Court.

39. I am satisfied from a review of the relevant authorities and from the principles set down in *Stephens v. Connellan*, that where a court validly embarks on a hearing within jurisdiction, but makes an error which causes the proceedings to become fundamentally unfair, that is an error which entitles the applicant to an order of *certiorari*, but remains an error within jurisdiction; such that the applicant is entitled to rely on the defence of autrefois acquit.

40. In argument, Mr. Kelly BL, on behalf of the DPP, relied on the decision in *State (Holland) v. Kennedy*, as authority for the proposition that it is possible to commence proceedings within jurisdiction, but where a sufficiently serious error is made, that can have the effect of depriving the court of jurisdiction thereafter. He submitted that the consequence of that happening, was that the court would no longer have jurisdiction to impose the conviction and/or sentence at the conclusion of the proceedings, where it had lost jurisdiction during the course of the proceedings. While that may be true in certain circumstances, I do not think that it applies to the circumstances of this case.

41. In *State (Holland) v. Kennedy*, the District Court Judge had imposed a sentence of imprisonment on a 15-year-old minor, without making the necessary finding that he was of an unruly character, which was necessary to give him jurisdiction to impose a term of imprisonment, rather than a period of detention in an approved detention centre. In delivering the judgment of the Supreme Court, Henchy J. had expressed the view that the

learned District Court Judge had not conducted the type of inquiry which was mandatory before such a certificate could issue. Evidence of past conduct was insufficient. "Character" in the subsection, connoted a person's nature or disposition, rather than his reputation. So it was necessary to inquire whether the applicant, at the date of sentence, was a person of "so unruly a character" that the subsection applied. Accordingly, the conviction was set aside.

42. The court is satisfied that the circumstances in that case are different to the circumstances that arise in this case, due to the fact that the error made by the District Court Judge, meant that he did not have jurisdiction to impose the sentence that he did. Thus, the error caused him to go outside, or in excess, of his jurisdiction. In the present case, the error did not cause the judge to go outside her jurisdiction, but instead, she had conducted the trial in a manner that was fundamentally unfair to the accused and had had regard to matters in the statement of the prosecuting sergeant, to which she should not have had regard when reaching her decision on the guilt or innocence of the accused. While these were serious errors, that warranted the granting of an order of *certiorari*, they did not deprive her of jurisdiction.

43. Thus, I am satisfied that the error in this case was an error made within jurisdiction. I am satisfied that the applicant remained in jeopardy in those proceedings and therefore, is entitled to rely on the plea of *autrefois acquit*. In these circumstances, I hold that the court must refuse remittal of the matter to the District Court.

44. Even if I am wrong in that finding, I am satisfied that having regard to the relevant factors as outlined by counsel in the course of argument at the bar, it would not be appropriate in this case to direct the remittal of the matter to the District Court, even if I held that such discretion arose.

45. In particular, the court is satisfied that having regard to the following matters it would be inappropriate to remit the matter to the District Court: a delay of over 3.5 years since the date of the alleged offence; such delay was not the fault of the applicant; the applicant has to an extent "played his hand" by giving evidence at the previous hearing; the applicant has incurred costs in the matter; while the offence is serious, it is not at the most serious end of the scale; and the fact that submissions were made to the District Court, when the applicant's solicitor raised concerns about the fact that the judge had had regard to portions of the statement made by the sergeant when reaching her decision, which

application had been opposed by the DPP. The court is satisfied that taking all these matters into account, if the discretion arose, it should be exercised against remitting the matter to the District Court.

46. Having regard to its findings herein, the court proposes to make an order providing for the following:

(a) An order of *certiorari* setting aside the conviction of the applicant entered at District Court No. 1 on 14th September, 2021;

(b) Refuse the application of the second respondent to remit the matter to the District Court.

47. As this judgment has been delivered electronically, the parties will have two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

48. The matter will be listed for mention at 10.30 hours on 18th May, 2023 for the purpose of making final orders.