DPP v Sp. Crim. Ct.
HAMILL - DPP

258

THE HIGH COURT

1982 No. 10114P

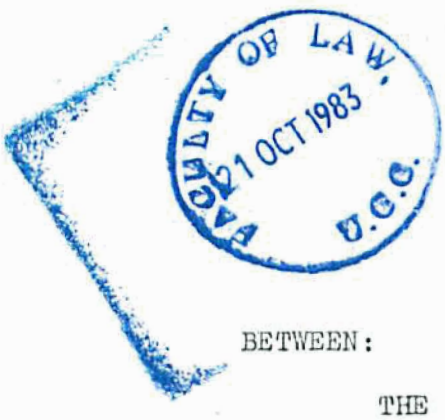
DANIEL J. HAMILL

Plaintiff

and

DIRECTOR OF PUBLIC PROSECUTIONS

Defendant



and

STATE SIDE

1982/683S.S.

BETWEEN:

THE STATE (AT THE PROSECUTION OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

Applicant

and

THE SPECIAL CRIMINAL COURT

Respondent

JUDGMENT of Mr. Justice Barrington delivered the 18th day of May 1983

In the main action above referred to the Plaintiff seeks an injunction restraining the Director of Public Prosecutions from proceeding with a prosecution now pending against the Plaintiff in the

Special Criminal Court. In the State Side matter the Director of Public Prosecutions seeks an absolute order of certiorari for the purpose of quashing an order of the Special Criminal Court dated the 29th day of October 1981 whereby the Plaintiff in the main action was convicted on two counts hereinafter referred to, on the grounds that the said order was made without jurisdiction.

The background to the cases is, to say the least, complicated, and is as follows.

On Friday the 11th July 1981 the Plaintiff was brought before the Special Criminal Court and there charged with eleven offences. One of these charges (being Charge No. 4) was subsequently withdrawn. It read as follows:-

> "4. You Daniel J. Hamill on the 14th day of July 1981 at Muckno Street, Castleblayney in the County of Monaghan falsely imprisoned one Cyril Mallon by unlawfully detaining him against his will. Contrary to section 10 of the Criminal Law (Jurisdiction) Act 1976".

Later an indictment containing 10 counts was preferred against the Plaintiff.

At the trial of the Plaintiff, which took place on the 27th,

the 28th and the 29th days of October 1981 the Plaintiff was acquitted on Counts 1, 2, 3, 7 and 8 on the said indictment and the present case is not concerned with them.

It is concerned with the other five counts on the indictment and with what took place in the Special Criminal Court concerning them before the Plaintiff's trial began.

The counts with which this case is concerned read as follows:-

"Statement of Offence

Count No. 4: Robbery contrary to section 23(1) of the Larceny Act 1916 as inserted by section 5 of the Criminal Law (Jurisdiction) Act 1976.

Particulars of Offence

Patrick P. McDonald and Daniel J. Hamill on the 14th day of July 1981 in the County of Monaghan robbed one Cyril Mallon of a cheque No. 000808 drawn on the Bank of Ireland, Castleblayney and signed Cyril E. Mallon.

Statement of Offence

Count No. 5: Unlawful exercise of control of a vehicle contrary to section 10 of the Criminal Law (Jurisdiction) Act 1976.

Particulars of Offence

Patrick P. McDonald and Daniel J. Hamill on the 14th day of July 1981 in the County of Monaghan unlawfully and by threat or force exercised control over a vehicle.

Statement of Offence

Count No. 6: Assault occasioning actual bodily harm contrary to section 47 of the Offences Against the Person Act 1861

Particulars of Offence

Patrick P. McDonald and Daniel J. Hamill on the 14th day of July 1981 in the County of Monaghan assaulted one Cyril Mallon thereby occasioning him actual bodily harm.

Statement of Offence

Count No. 9: Possession of a firearm in suspicious circumstances, contrary to section 27(a)(1) of the Firearms Act 1964, as inserted by section 8 of the Criminal Law (Jurisdiction) Act 1976.

Particulars of Offence

Patrick P. McDonald and Daniel J. Hamill on the 14th day of July 1981 in the County of Monaghan had possession of a firearm in such circumstances as to give rise to a reasonable inference that they had not got it in their possession for a lawful purpose.

Statement of Offence

Count No. 10: Possession of a firearm with intent to endanger life, contrary to section 15 of the Firearms Act 1925, as amended by the Firearms Act 1964 and 1971, and the Criminal Law (Jurisdiction) Act 1976.

Particulars of Offence

Patrick P. McDonald and Daniel J. Hamill on the 14th day of July 1981, had in their possession a firearm with intent to endanger life."

It will be seen from the foregoing that the offences charged at Counts 9 and 10 are scheduled offences for the purposes of the Offences Against the State Acts while the offences charged at Counts 4, 5 and 6 are non-scheduled offences.

At the hearing before the Special Criminal Court Mr. Paul Carney, senior counsel, appeared for the Plaintiff, Mr. Patrick McEntee, senior counsel, appeared for the co-accused Mr. McDonald, while Mr. Robert Barr, senior counsel, represented the Director of Public Prosecutions.

Mr. Barr sought to amend the date given for the offences charged in Counts 4, 5 and 6 from the 14th day of July 1981 to the 15th day of July 1981. The basis for his application was that the matters complained of had taken place on the night of the 14th/15th day of July 1981, but in the small hours of the 15th day of July, so that the date which should appear in the indictment in respect of these counts should be the 15th day of July 1981.

Mr. Justice Hamilton, who was the presiding Judge, indicated that had the Court been the Central Criminal Court there would have been no difficulty about granting the amendment sought but the Court being the Special Criminal Court, and the offences charged being non-scheduled offences, the Court was faced with the problem that if it granted the amendment sought to the indictment, the date appearing for the offences charged in the indictment would be different from the date appearing in the certificate given by the Director of Public Prosecutions certifying that the ordinary Courts were inadequate to secure the effective administration of justice in relation to the offences charged. The Court accordingly refused to grant the amendments sought in respect of Counts 4, 5 and 6.

Mr. Barr made a similar application in relation to Counts 9 and 10, being the secheduled offences. Here the jurisdiction of the Special Criminal Court depended, not on the written certificate of the Director of Public Prosecutions, but on his direction given pursuant to section 47 of the Offences Against the State Act 1939 as adapted.

Mr. Barr obtained the direction of the Director of Public Prosecutions in relation to the counts charged at Count No. 9 and Count No. 10 but with the significant substitution of the 15th day of July for the 14th day of July as the date on which the offences were alleged to have been committed. The Court then amended Counts 9 and 10 to substitute the 15th day of July for the 14th day of July as the dates on which the offences were alleged to have been committed.

It is clear from the transcript of what took place before the Special Criminal Court that Mr. McEntee and Mr. Carney at all times maintained that the wrong procedure was being followed.

At some point, which does not appear from the transcript, the Director of Public Prosecutions entered a nolle prosequi in respect of

Counts Nos. 4, 5 and 6. The trial proceeded on the rest of the indictment, as amended. The plaintiff was convicted on Counts 9 and 10, as amended, and was sentenced to five years imprisonment on Count 9 and to eight years imprisonment on Count 10. The sentences were to run concurrently.

The Plaintiff appealed to the Court of Criminal Appeal. The matter came before the Court of Criminal Appeal on the 28th day of June 1982 and that Court, in its order, set out its findings as follows:-

> "The Court doth find that the Special Criminal Court had no jurisdiction to try the applicant on the aforesaid charges and doth allow the said application for leave to appeal and treating the hearing of the application as the hearing of the appeal doth order that the said Daniel J. Hamill be released from custody forthwith."

I have seen an extract from the Registrar's courtbook for Monday the 28th June 1982 and it is clear that the Court of Criminal Appeal held that the Special Criminal Court had no jurisdiction to try the accused on Counts 9 and 10 as amended. It was clearly competent for the Director of Public Prosecutions to give a direction in relation to an offence alleged to have been committed on the 15th

July but the procedures contemplated by the Rules of the Special Criminal Court had not been followed in relation to such a charge. As things stood the charge preferred related to matters alleged to have taken place on the 14th July 1982 whereas the indictment as amended related to matters alleged to have taken place on the 15th July 1982. In other words the Court of Criminal Appeal appears to have taken the view that when the error in the indictment was discovered the Director of Public Prosecutions should, as it were, have started all over again. He should have not only given his direction in relation to the matters alleged to have taken place on the 15th but should have preferred fresh charges and served a new book of documents in relation to them. The Court of Criminal Appeal pointed out that the Special Criminal Court was a creature of Statute and that the conditions of its Statutes, on which its jurisdiction depended, must be rigorously and meticulously observed.

It seems clear that the Court of Criminal Appeal took the view that the proceedings before the Special Criminal Court, from the point where that Court purported to amend Counts 9 and 10, were void so far as these counts were concerned. The Court did not therefore

purport to reverse the decision of the Special Criminal Court. It said that that decision had been made without jurisdiction and directed the release of the Plaintiff. Under these circumstances it is not surprising that the Court of Criminal Appeal did not direct a new trial.

The Court of Criminal Appeal did not purport to quash the order of the Special Criminal Court.

In the certiorari proceedings presently before me the Special Criminal Court has not purported to show cause in defence of its order dated the 29th day of October 1981 but Mr. Hamill has filed notice dated the 17th day of December 1982 purporting to show cause why the conditional order made herein should not be made absolute.

On the 6th July 1982 the Plaintiff was re-arrested and brought before the Special Criminal Court where seven charges were preferred against him.

These charges read as follows:-

"1. You Daniel J. Hamill on the 15th day of July 1981 at Muckno Street, Castleblayney in the County of Monaghan falsely imprisoned one Cyril Mallon by unlawfully detaining him against his will contrary to section 11 of the Criminal Law (Jurisdiction) Act 1976.

"2. You Daniel J. Hamill on the 15th day of July 1981 at Muckno Street, Castleblayney in the County of Monaghan robbed one Cyril Mallon of a cheque No. 000808 drawn on the bank of Ireland Castleblayney and signed Cyril E. Mallon contrary to section 23 of the Larceny Act 1916 as inserted by section 5 of the Criminal Law (Jurisdiction) Act 1976.

3. You Daniel J. Hamill on the 15th day of July 1981 at Castleblayney in the County of Monaghan unlawfully by threat of force exercised control over a vehicle contrary to section 10 of the Criminal Law (Jurisdiction) Act 1976.

4. You Daniel J. Hamill on the 15th day of July 1981 at Muckno Street, Castleblayney in the County of Monaghan assaulted one Cyril Mallon thereby occasioning him actual bodily harm contrary to section 47 of the Offences against the Person Act 1861.

5. You Daniel J. Hamill on the 15th day of July 1981 at Muckno Street, Castleblayney in the County of Monaghan had in your possession a firearm with intent to endanger life contrary to section 15 of the Firearms Act 1925 as amended by the Firearms Act 1964 and 1971 and the Criminal Law (Jurisdiction) Act 1976.

6. You Daniel J. Hamill on the 15th day of July 1981 at Muckno Street, Castleblayney, in the County of Monaghan, had in your possession a firearm in such circumstances as to give rise to a reasonable inference that you had not got it in your possession for a lawful purpose. Contrary to section 27(a)(1) of the Firearms Act 1964 as inserted by section 6 of the Criminal Law (Jurisdiction) Act 1976.

7. You Daniel Joseph Hamill, on the 5th day of May 1981 at

"Market Square, Castleblayney, in the County of Monaghan knowingly had in your possession explosive substances, to wit, - 3 rolls of insulating tape, 2 lengths of white coloured flex wire, 1 roll of light plastic paper, about 1 foot wide on a paper roller, plastic bag containing (a) clothes peg with the drawing pins in jaws with flex wire folded thereto; (b) one English 50p coin with a small fishing hook soldered to it and covered with silver paper and approximately 100 yards of fishing line attached to the hook; (c) a spool containing more fishing line, under such circumstances as to give rise to a reasonable suspicion that you did not have them in your possession for a lawful object. Contrary to section 4 of the Explosive Substances Act 1883."

Of these new charges Charges 2, 3 and 4 correspond with Counts 4, 5 and 6 on the old indictment with the significant change that the matters charged are alleged to have taken place on the 15th day of July 1981 and not on the 14th day of July 1981 as appeared in the indictment.

Charges 5 and 6 correspond with Counts 10 and 9 in the old indictment subject to the same significant change.

Charge No. 1 in the new charge sheet appears to correspond with Charge No. 4 which appeared on the original charge sheet but which was withdrawn. There are, however, two significant differences. The events charged are alleged to have taken place on the 15th July 1981

and not on the 14th as originally charged and the charges were placed under section 11 of the Criminal Law (Jurisdiction) 1976 and not under section 10 of the same Act as originally charged. Section 11 of the Criminal Law (Jurisdiction) Act 1976 deals with the taking of evidence in Northern Ireland for the purposes of a criminal trial in the State and does not create any offence relevant to the facts pleaded in the new Charge No. 1. It may be that the intention was to refer to section 11 of the Criminal Law Act 1976.

The seventh of the new charges is a charge under section 4 of the Explosive Substances Act 1883. So far as this litigation is concerned it is a totally new charge. However, Mr. Hamill complains that the events charged are alleged to have taken place on the 5th May 1981 and that the relevant information must have been in the hands of the Director of Public Prosecutions prior to his original trial before the Special Criminal Court. If so, he says this charge should have been preferred with the other charges then preferred against him. He alleges that the Director of Public Prosecutions deliberately held this charge in reserve to be used if anything went wrong with the original prosecution. He alleges that, throughout, the Director

has been playing "cat and mouse" with him and has been guilty of an abuse of fair procedures.

The Plaintiff's application is for an injunction restraining the Director of Public Prosecutions from prosecuting him further on foot of the seven new charges. As different considerations arise in relation to different charges I propose to break the charges into four groups and deal with the different issues in that way.

I shall deal first with Charges 5 and 6 (corresponding to Counts 10 and 9 on the old indictment).

I shall then deal with Charges 2, 3 and 4 (corresponding with Counts 4, 5 and 6 on the old indictment).

Then I shall deal with Charge 7 which is a new charge.

Finally I shall deal with Charge No. 1 which resembles Charge 4 on the original charge sheet which said charge was withdrawn.

CHARGES 5 and 6

As I stated these charges, subject to the significant difference relating to dates, correspond with Charges 10 and 9 on the indictment before the Special Criminal Court.

The Plaintiff complains that he has already been convicted on foot

of these charges, that the conviction was reversed on appeal, and that the Court of Criminal Appeal did not order a new trial in respect of them. Not only was he convicted but he was sentenced and remained in prison on foot of his sentence from the 29th day of October 1981 until he was set free by the Court of Criminal Appeal on the 28th day of June 1982.

But it appears clear that the entire proceedings before the Special Criminal Court from the time the Court purported to amend the indictment until the conclusion of the trial were a nullity and that the Plaintiff was convicted and the sentence passed without jurisdiction. The entire proceedings before the Special Criminal Court from the time of the amendment of the Indictment were a nullity and form no bar to a further prosecution. It seems to me that there is ample authority for this proposition. See The State (Tynan) .v. Keane 1968 Irish Reports page 348; The State (De Burca) .v. O hUadhaigh 1976 Irish Reports page 85; The State (Kiernan) .v. De Burca 1963 Irish Reports page 348; The State (Holland) .v. Kennedy 1977 Irish Reports page 193; Conlin .v. Patterson 1915 2 Irish Reports page 169 and my own unreported judgment in The State (McMorrow) .v. District Justice

Barry in which judgment was delivered on the 17th day of July 1980.

Mr. Carney is no doubt correct when he submits that the Special Criminal Court had jurisdiction to deal with the Plaintiff when he appeared before them on Counts 9 and 10 of the indictment as originally framed though in relation to offences alleged to have been committed on the 14th day of July 1981. But the cases cited in the previous paragraph are authority for the proposition that a Tribunal which enters on a trial with jurisdiction may, by its subsequent actions, lose jurisdiction and render the proceedings - from the point at which it exceeds its jurisdiction at least - a nullity.

A disturbing aspect of the present case is that the Plaintiff should have spent 11 months in prison on foot of the invalid sentence already imposed on him. But one must assume that any Tribunal subsequently dealing with him will in the event of his being convicted on the new charges, give such weight to this aspect of the matter as is appropriate and just. A passage which appears at page 351 of the judgment of the former Chief Justice O'Dalaigh in The State (Tynan) .v. Keane 1968 Irish Reports page 348 discusses how this kind of situation may appropriately be dealt with.

When in the present case the Plaintiff obtained an injunction

restraining the Director of Public Prosecutions from prosecuting him further on foot of Charges 5 and 6 the Director applied to me on the 8th December 1982 for a conditional order of certiorari to quash the relevant order and convictions of the Special Criminal Court. I granted the conditional order. As previously stated the Special Criminal Court has not shown cause why the said conditional order should not be made absolute. The Plaintiff in the main action has, however, shown cause by notice. His cause shown is as follows:-

(a) The said conviction and order has already been quashed by the Court of Criminal Appeal;

(b) The Special Criminal Court embarked upon the trial of the Prosecutor with jurisdiction to try him and only became divested of jurisdiction by the actions of the Prosecutor in the course of the trial;

(c) The Prosecutor is estopped from maintaining these proceedings by virtue of having through his counsel endeavoured to uphold the validity of the conviction in the Court of Criminal Appeal;

(d) The proceedings herein are out of time.

It appears to me that what happened in the Court of Criminal Appeal in the present case was not a formal quashing of the order of the Special Criminal Court. The Court of Criminal Appeal, however, having declared that the Special Criminal Court had acted without jurisdiction, it appears to me that it was reasonable for the Director of Public Prosecutions not to have moved formally to quash the order of the Special Criminal Court until the Plaintiff in the main action attempted to make use of that order to defeat the prosecution now pending against him in the Special Criminal Court. Nor do I think the Director of Public Prosecutions can be estopped from now applying for certiorari simply because his counsel put forward a different view of the law in the Court of Criminal Appeal. In all the circumstances it appears to me to be correct to extend the time to apply for certiorari and to make absolute the conditional order.

CHARGES 2, 3 and 4

I turn next to Charges 2, 3 and 4 on the new charge sheet corresponding as they do to Counts 4, 5 and 6 on the old indictment with the significant difference that the matters charged are alleged to

have taken place on the 15th July 1981 and not on the 14th July 1981 as charged in the original indictment. Charges 4, 5 and 6 relate to the non-scheduled offences discussed above. It seems clear that the Director of Public Prosecutions when issuing the certificates had in mind three specific offences but, in the circumstances already outlined, these offences were alleged in his certificate to have taken place on the 14th July 1981 and not on the 15th July 1981. When the error was discovered the Director attempted to amend these counts in the indictment by altering the date from the 14th to the 15th but, in the circumstances already outlined, the Special Criminal Court felt that it had no jurisdiction to make the amendments requested. The Court having refused to make the amendments the Prosecution did not proceed with Counts 4, 5 and 6. It is not clear at what stage the Prosecution applied formally to enter a nolle prosequi. But it is clear from the transcript of the first day of the hearing that Mr. Barr by intimating that he was proceeding with Counts 1, 2, 3, 7, 8, 9 and 10 by implication conveyed to the Court that he was not proceeding with Counts 4, 5 and 6. The accused were accordingly arraigned only on Counts 1, 2, 3, 7, 8, 9 and 10. (See the transcript

for the first day's hearing pages 13 to 17 inclusive).

The order of the Special Criminal Court dated the 29th day of October 1981 purported to grant liberty to the Director of Public Prosecutions to enter a nolle prosequi on Counts 4, 5 and 6 as against Daniel J. Hamill pursuant to the provisions of Section 12 of the Criminal Justice Administration Act 1924.

Mr. Carney has submitted that the Special Criminal Court has no power to receive a nolle prosequi and that the Court must therefore be considered as having disposed of Counts 4, 5 and 6. Mr. O Cuiv, on behalf of the Director of Public Prosecutions, submits that section 41 sub-section (4) of the Offences against the State Act 1939 which provides that the practice and procedure applicable to the trial of a person on indictment in the Central Criminal Court shall, so far as practicable, apply to the trial of a person by the Special Criminal Court, is broad enough to give the Special Criminal Court power to accept a nolle prosequi.

However, I doubt if it is necessary to decide this point. For if the Special Criminal Court is to be deemed to have disposed of Counts 4, 5 and 6 it has disposed of counts relating to matters

alleged to have taken place on the 14th July 1981. I know that the Director has at all times maintained that he was concerned with three specific offences. But the difficulty which has arisen in the present case arose from the limited statutory nature of the jurisdiction of the Special Criminal Court. In the circumstances the difference in dates was of vital importance. It appears to me that the Special Criminal Court was right not to make the amendments requested to Counts 4, 5 and 6 because the Court had no jurisdiction to make those amendments. But this having happened, it appears to me that it would be wrong for this Court now to say that the Director cannot now prosecute in respect of the new Charges 2, 3 and 4 because these charges are essentially the same as the old counts, the difference in dates being of no importance.

Mr. Carney also submits that even if the Special Criminal Court had power to accept the nolle prosequi referred to, the Director of Public Prosecutions should still be injuncted on the principles set out in The State (O'Callaghan) .v. District Justice O hUadhaigh 1977 Irish Reports page 42 from bringing a fresh prosecution. I do not think that this case is governed by the principle of O'Callaghan's case. The Director having failed to obtain the amendments requested

to Counts 4, 5 and 6 in the indictment did not present evidence on these counts.

CHARGE 7

This charge is a charge brought under the Explosive Substances Act 1883. The events giving rise to the charge are alleged to have happened on the 5th day of May 1981. The ten counts in the original indictment referred to matters alleged to have taken place in July 1981. The Plaintiff's trial took place on the 29th October 1981 and the Plaintiff submits that the Director of Public Prosecutions must have known by October 1981 of the matters on which the charge under the Explosive Substances Act is based. The Plaintiff further suggests that the Director might have preferred this charge at the time of the Plaintiff's original trial but that he deliberately held it in reserve.

If the Plaintiff's suspicions were well founded it would be a serious matter but I am satisfied from the affidavit sworn by Mr. Liddy of the Office of the Director of Public Prosecutions in this case and from the oral evidence of Mr. Liddy, that the Plaintiff's suspicions in so far as they suggest any impropriety on the part of the

Director of Public Prosecutions, are not well founded.

I am satisfied, on the basis of Mr. Liddy's evidence, that what took place was as follows.

On the 20th August 1981 the Director of Public Prosecutions received a file relating to the alleged possession by the Plaintiff of explosives on the 5th May 1981. At this stage the Plaintiff had already been charged with the original eleven charges preferred against him. On the 23rd September 1981 the Director directed that the Prosecutor be charged with an offence under section 4 of the Explosive Substances Act. Due to an inadvertence in the Chief State Solicitor's office the charge under section 4 of the Explosive Substances Act was not preferred against the Plaintiff prior to his trial.

The mistake was discovered after the Plaintiff's trial and conviction. The Director of Public Prosecutions then decided, personally, that having regard to the fact that the Plaintiff had been convicted by the Special Criminal Court and had been sentenced to terms of five years imprisonment and eight years imprisonment it would be inappropriate to proceed with the charge under the Explosive

Substances Act.

When, however, the Court of Criminal Appeal decided that the Special Criminal Court, in convicting the Plaintiff, had acted without jurisdiction and directed the Plaintiff's release, the Director of Public Prosecutions reconsidered the matter. He considered that, in the new situation, a charge under the Explosive Substances Act should be preferred.

It appears to me that the Director was and is entitled to do what he did. It is clear from the history of this matter that mistakes have been made and that the Director took a view of the law which the Court of Criminal Appeal did not accept. But in my view there has been no unfairness or no oppressive conduct on the part of the Director. He has been merely carrying out the functions of his office.

CHARGE NO. 1

I do not think that this charge can be faulted merely because the Director originally preferred and withdrew (at Charge No. 4) a charge in similar terms. However, the charge presently preferred purports to charge an offence under section 11 of the Criminal Law

(Jurisdiction) Act 1976 and it is clear that that section creates no offence of the kind contemplated in the charge. The matter merely needs to be mentioned for it to be obvious that a mistake has been made. In the circumstances I do not think that I should issue an injunction in respect of this matter but I might ask for an assurance from the Director that no further step will be taken on foot of this charge as presently formulated.

In all the circumstances it appears to me that the proper course is to make absolute the conditional order sought by the Director of Public Prosecutions and to dismiss the Plaintiff's claim.