



THE COURT OF APPEAL

NO REDACTION NEEDED

[192/18]

**The President
Edwards J
Kennedy J**

**IN THE MATTER OF SECTION 34 OF THE CRIMINAL PROCEDURE ACT 1967 (AS
AMENDED)**

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

J.D.

RESPONDENT

JUDGMENT of the Court delivered on the 22nd day of January 2021 by Birmingham P.

1. This is application brought by the Director of Public Prosecutions ("DPP") pursuant to s. 34 of the Criminal Procedure Act 1967 (as amended) which provides as follows:

"34.—(1) Where a person tried on indictment is acquitted (whether in respect of the whole or part of the indictment) the Attorney General in any case, or if he or she is the prosecuting authority in the trial, the Director of Public Prosecutions may, without prejudice to the verdict or decision in favour of the accused person, refer a question of law arising during the trial to the Court of Appeal for determination or, in the case of a person who is tried on indictment in the Central Criminal Court, make application to the Supreme Court under Article 34.5.4° of the Constitution to refer a question of law arising during the trial to it for determination."

2. It is, therefore, what is sometimes referred to as a "without prejudice" prosecution appeal. The question of law that has been referred to this Court is as follows:

"Was the learned Trial Judge correct in law in directing the Jury to return a verdict of not guilty on count 3 of the indictment in circumstances where the investigation did not include the accused being interviewed?"

Background

3. The background to the proceedings in Longford Circuit Criminal Court and now to this appeal are to be found in events that occurred on 15th December 2016. Arising from

those events, the respondent to this application stood trial in the Circuit Court on 15th November 2017. He was charged with six offences in total: three counts of dangerous driving; one count of endangerment; one count of driving a vehicle without a driver's licence; and one count of using a vehicle without valid insurance. Thus, five of the six matters before the Court were summary in nature, the exception being the endangerment matter.

4. The then accused pleaded not guilty and a jury was empanelled. Prior to the evidence being called, or indeed, the formal opening of the case, counsel on behalf of the then accused made an application in the absence of the jury, seeking to have his client acquitted by direction on all counts on the basis that he had not been interviewed by Gardaí in relation to the alleged offences. This issue arose in the following circumstances.
5. On 15th December 2016, two members of An Garda Síochána observed the respondent driving a vehicle in Edgeworthstown. One of the Gardaí knew him and knew that he did not have a driving licence. He was the sole occupant of the vehicle. Gardaí pursued him and, in the course of the pursuit, observed various incidents of what they regarded as dangerous driving. The respondent exited the vehicle in the vicinity of his home and ran to nearby fields. Gardaí searched for him, but the search was fruitless.
6. On 20th December 2016, the respondent was arrested under s. 53 of the Road Traffic Act 1961 (as amended) on suspicion of dangerous driving. He was brought to Longford Garda station where he was attended on by a solicitor and charged with five counts of dangerous driving. The respondent made no reply after caution when charged.
7. On 9th February 2017, he was charged before the District Court with endangerment arising out of the events of 15th December 2016. Again, he made no reply after caution when charged and was subsequently sent forward for trial.
8. In the absence of the jury, counsel on behalf of the then accused submitted that the Gardaí, in not interviewing the respondent, "had complete disregard of the rules of law". It was submitted that the failure to question the respondent in custody was "a right that has been violated by the [G]ardaí in not affording him the opportunity to give his version or account of the facts".
9. In reply, it was submitted on behalf of the DPP that the respondent had been arrested on suspicion of dangerous driving, which is a summary offence. As it is not an arrestable offence, the Gardaí could not have detained him under s. 4 of the Criminal Justice Act 1984.
10. In exchanges with counsel, the judge commented:

"I have never come across a case, though, that went to a jury trial, which is -- involving an arrestable offence, where the person isn't arrested and given an opportunity to respond to the allegations. I've never come across it, and it certainly is a breach of due process, as far as I'm concerned, and I couldn't

countenance that charge going to the jury in those circumstances. Now, the dangerous driving is a different -- in my view, what might be the appropriate thing is that be remitted back to the District Court for prosecution."

What the judge then had to say to the jury was instructive. He referred to the history of the investigation, including the fact that the defendant was initially charged with a number of charges of dangerous driving and having no driving licence before the file was sent to the DPP who, having reviewed it, came back directing a prosecution for endangerment. The judge continued on to explain that the accused was then charged with endangerment, but was never arrested and interviewed in relation to it, and that this was a procedure that must always happen in cases involving an arrestable offence because, in essence, when Gardaí investigate a case, they have to investigate all sides of it, both inculpatory and exculpatory aspects. The judge continued:

"So, as part of the fair procedures and due process, if you are suspected of having committed an arrestable offence, you are normally arrested by the [G]ardaí, brought in and interviewed, and the allegations are put to you, and you're given an opportunity to respond to those allegations, and the responses to those allegations can, on occasions, form part of the defence when the matter comes for a jury trial, because the accused has a right of silence and doesn't have to give evidence in their own defence, and no adverse inferences can be drawn from that, and that is an established principle in our criminal procedure. But it is also an established principle that due process should take place in respect of those matters, particularly when they're going before a jury, and that a jury would, if necessary, have the benefit of the memos of interview that the [G]ardaí undertook, and that may be the defence that the accused is proffering.

In the absence of those memos of interview, the accused was being compelled, basically, to go into the witness box and be subjected to cross-examination, and that's a breach of his right to not testify, and so, for those reasons, because there was a failure to observe fair procedures, an application was made by Mr Flynn, counsel for the accused, to have those charges taken from the jury, and I'm satisfied that in the unusual circumstances of this case, and I don't fault the [G]ardaí for this -- it was an unusual set of circumstances -- that it is appropriate, because the fair procedures weren't observed, that you should return a verdict of not guilty in respect of that charge..."

11. It should be noted that the application in the Circuit Court was in respect of all counts on the indictment, but the judge, of his own motion, decided to differentiate between the serious indictable matter (the endangerment count) and the other summary matters. In this Court, counsel on behalf of the respondent, Mr. J.D., has not sought to go behind the judge's ruling and has accepted that there is a rational basis for requiring different and more elaborate procedural requirements in cases involving the investigation of more serious matters.
12. Before addressing the substance of the issues that arise, we divert to say a word about the procedures followed by counsel for the then accused in the Circuit Court. In our view,

the procedure adopted was unorthodox and not the appropriate one. The procedure followed is not easy to categorise, but might be regarded as what is often referred to as a P.O.C.-type application (DPP v. P.O.C. [2006] 3 I.R. 238), or a quasi-P.O.C. application. If that is so, it was not an application that should have been made by way of pre-emptive strike before any evidence was heard. However, in a situation where no objection was taken by the prosecution to the procedure that was embarked upon, and where there was no discussion or debate with the trial judge, we would not think it appropriate that this case should be decided on procedural or technical grounds. However, we would not want it thought that we were approving of the procedure followed.

The Submissions on Appeal

13. Counsel for the respondent says that there is an obligation to carry out a fair investigation. He says the fact that the respondent was never questioned meant that the Court was denied access to relevant evidence, i.e. the accused's version of events. This was a matter of particular concern when the offence charged (endangerment) requires the presence of a particular *mens rea*, intention or recklessness.
14. It is said that by reason of the fact that he was not offered an opportunity to answer or rebut the allegations against him, or to put forward his own version of events, this meant that if the trial proceeded, he would have been forced into the position of giving evidence. In that regard, he points to observations of the trial judge, both in ruling on the application and in providing an explanation to the jury as to why he was directing the jury to deliver a verdict of not guilty.
15. Arguing in support of the approach of the trial judge, counsel on behalf of the respondent says that while there is no rule of law that compels a member of An Garda Síochána to detain a suspect for the purpose of questioning in relation to an indictable offence, it is submitted that when a suspect is not offered an opportunity to answer, rebut or put forward his version of events concerning the alleged endangerment to Gardaí in a regulated environment in the presence of a solicitor, the effect of this is that the defendant is coerced into a position of being obliged to give evidence in the criminal trial, thereby setting at naught his right to silence and his right not to self-incriminate. Counsel on behalf of the respondent says bluntly that due process required that the respondent be interviewed regarding the alleged endangerment of pedestrians in Edgeworthstown on 15th December 2016.
16. For her part, the Director says that the respondent in the Circuit Court was litigating an issue in the abstract. She says that there was no indication of any version of events which the accused wished to put forward, and still less, any version of events which he wished to put forward and was prevented from doing. In that context, the Director points to the guilty pleas entered on the other counts which formed part of the same incident. The Director says that when charged, the accused had the option of replying after caution. Further, the defendant had the option of giving evidence at trial and putting forward any version of events that he wished.

Discussion & Decision

17. Undoubtedly, the sequence of events that emerged in this case was an unusual one, involving, as it did, the pursuit of a suspect (but not his apprehension) and the arrest and charging with summary offences at a later stage, and then the proffering of an additional indictable charge. For our part, we cannot agree with the approach taken by the trial judge. It was open to the accused to respond when charged and cautioned. It was open to him to submit an account of events at any stage, if he wished to do so, and to argue at trial for the admissibility of that account. It was open to him to participate in the trial and to put forward his version of events by way of cross-examination and/or by giving evidence. It seems to us that he had no entitlement to be detained and questioned, and no entitlement to put forward a version of events which would be immune from challenge or interrogation.

18. In our view, the judge was in error in deciding to withdraw the case from the jury, and the explanation that he gave to the jury demonstrates that his reasons for doing so were flawed. Accordingly, we would answer the question posed by saying that the judge was not correct in law in directing the jury to return a verdict of not guilty.