

STATE (McKEON)

THE HIGH COURT

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1982 No.674 S.S.



IN THE MATTER of an Application for an Order of Certiorari and Prohibition

IN THE MATTER of the Constitution of Ireland

IN THE MATTER of the Criminal Procedure Act 1967

BETWEEN/ THE STATE (at the prosecution of Sean McKeon) Prosecutor

-and-

DISTRICT JUSTICE SEAN MAGEE Respondent

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

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In this case the Prosecutor seeks an order of Certiorari for the purpose of quashing an Order made by District Justice Sean Magee sending the Prosecutor forward for trial to the Special Criminal Court on a charge of robbery.

A Conditional Order was granted by Barrington J. on the 3rd December, 1982, on the grounds set forth in paragraph 5 of the affidavit of the Prosecutor grounding the said application. The said paragraph referred to an alleged refusal on the part of the Respondent to enable the Prosecutor to have certain witnesses brought before the Court to give evidence on sworn deposition during the preliminary examination leading to the making of the Order sending the Prosecutor forward for trial.

The picture presented by the grounding affidavit is confused, and an affidavit showing cause why the Conditional Order should not be made absolute

was filed on behalf of the Respondent, and sworn by Robert Eagar, an Assistant State Solicitor in the office of the Chief State Solicitor, who was in charge of the prosecution during the said preliminary examination before the District Court. As no application was made to cross-examine him on the contents of the said affidavit, I have to assume that the account given by him as to the course taken by the said preliminary examination is accepted as correct by the Prosecutor, or alternatively that the Prosecutor contends that even assuming that the account given by Robert Eagar is correct in its entirety, he is nevertheless entitled to have the Conditional Order made absolute for the purpose of quashing the return for trial.

The complaints made by the Prosecutor as to the course taken by the said preliminary examination appear to be two in number. He claims that an application was made on his behalf by the solicitor who represented him, to have persons brought before the District Court for the purpose of giving evidence on sworn deposition, who were not listed as witnesses whom the prosecution proposed to call at the trial, but who were referred to in the statements of witnesses who did feature in that list. Secondly, he claims that he was required to take part in an identification parade, and that he also wished to have the other persons who participated in that identification parade called to give evidence on sworn deposition before the District Justice, and for that purpose to be furnished with their names and addresses.

As to the first matter of complaint, Robert Eagar deposes in Par. 8 of his affidavit to the fact that he agreed to other bank staff, not Prosecution witnesses, being called in evidence by the Prosecutor but that he contended that the Prosecutor himself would have to secure their attendance in Court. This, in my opinion, was a correct course for the Prosecution to adopt, and this matter of complaint does not appear to have been pursued further by the Prosecutor. A further complaint was made in the Prosecutor's grounding affidavit that he requested that two witnesses who had completed their sworn depositions before the District Justice be recalled in order to be examined further, and that this request was refused by the District Justice. I hold that the learned District Justice had a discretion to accede to or refuse such a request after the sworn deposition had already been completed and that he acted within his jurisdiction in refusing this request made on behalf of the Prosecutor.

There remains for consideration the point taken that the Prosecutor was not furnished with the names of the persons who took part with him in the identification parade, and was prevented from calling them to give evidence on sworn deposition before the District Justice during the course of the preliminary examination.

I would hold that when a person is named as witness whom it is proposed to call at the trial, an accused is given the right by Sec. 7(2)

of the Criminal Procedure Act, 1967, to require his attendance before the District Justice during the preliminary examination so that his evidence may be given at that stage by way of sworn deposition. In addition the accused may require the attendance before the Justice of any other person for the same purpose, but there is not, in my opinion, any obligation imposed either on the Prosecution or on the District Justice to supply the accused with the names and addresses of any such persons that he may wish to call as witnesses. Different considerations may apply if and when an accused person is sent forward for trial, and wishes to be given information which may help him in preparing his defence. The object of the preliminary investigation is not to determine the guilt or innocence of the accused person, but to determine whether, in the opinion of the District Justice, there is a sufficient case to put the accused on trial for the offence with which he has been charged. (See The State (Shanahan) v. The Attorney General, (1964) I.R. 239). The affidavit of Robert Eagar, at Par. 14, indicates that the District Justice ruled that he would not direct the Prosecution to disclose the names and addresses of the persons other than the Prosecutor who took part in the identification parade. In my opinion he acted within his jurisdiction in making this ruling. It does not appear that any witness was tendered on behalf of the Prosecutor to give evidence on sworn deposition, who was not allowed by the Respondent to give

such evidence. I was informed that the names and addresses of those who took part in the identification parade have been furnished to the Prosecutor since the order was made sending him forward for trial.

In these circumstances, I take the view that the District Justice did not act without jurisdiction or in excess of jurisdiction or in any manner which contravened the obligation to observe fair procedures, and accordingly the application to make absolute the Conditional Order of Certiorari notwithstanding the cause shown on behalf of the Respondent is refused, and the Conditional Order is hereby discharged.

I would also refuse the present application on the ground of delay in applying for the discretionary remedy by way of certiorari, having regard to the fact that the order sought to be impugned was made on the 28th July, 1982; the application for a Conditional Order of Certiorari was not made until the 3rd December, 1982, at a time when the trial before the Special Criminal Court had been listed for hearing on the 7th December, 1982; and no explanation for the delay which took place has been put forward in the grounding affidavit of the Prosecutor, or during the course of the proceedings seeking to have the Conditional Order made absolute.

Approved.

*R. J. O'Hanlon*

R.J. O'Hanlon.  
18th March, 1983.

Note

Counsel for the Prosecutor:-

Counsel for the Respondent:- Aindrias O Guiv, B.L. (instructed by The Chief State Solicitor).