

STATE (COMERFORD)

1985-687

SS

227

THE STATE (COMERFORD)

.v.

DISTRICT JUSTICE KIRBY

Judgment of Mr. Justice Barron delivered the 23rd day of
July 1986

In this case the Prosecutor was charged that he did on the 8th September, 1985 at Goatstown Road, Goatstown, Dublin in the Dublin Metropolitan District being a person that knew that a mechanically propelled vehicle registered number 4038 ZO was taken possession of or used without the consent of the owner thereof or other lawful authority did allow himself to be carried in such vehicle without the consent of the owner of the said vehicle or other lawful authority contrary to Section 112 of the Road Traffic Act, 1961 as amended by Section 65 of the Road Traffic Act, 1968 as amended. The complaint was heard by the Respondent at Dundrum District Court on the 8th November, 1985. The Respondent convicted the Prosecutor and sentenced him to eight months imprisonment.

The offence with which the Prosecutor was charged is one which carries different possible penalties depending upon whether there is a summary conviction or a conviction or indictment. Subsection (2) of ~~that~~ ¹¹² section as inserted by Section 3 (7) of the Road Traffic (Amendment) Act 1984 is as follows:

"(2) A person who contravenes subsection (1) of this section shall be guilty of an offence and shall be liable -

- (a) on summary conviction, to a fine not exceeding £1,000 or, at the discretion of the court, to imprisonment for a term not exceeding 12 months, or to both such fine and such imprisonment;

- (b) on conviction on indictment, to a fine not exceeding £2,000 or, at the discretion of the court, to imprisonment for a term not exceeding five years or to both such fine and such imprisonment."

There is nothing however in the section to indicate the circumstances in which the charge should be prosecuted summarily rather than on indictment or on indictment rather than summarily.

In the course of the hearing before the Respondent, the Solicitor for the Prosecutor established that the Director of Public Prosecutions had not consented to the charge being disposed of summarily. At the conclusion of the prosecution case, he sought a dismissal upon the ground that the consent of the Director to summary trial was a necessary proof. The Respondent refused the application on the ground that he was aware that the Director had given a blanket consent which covered the matter. He also refused to state a consultative case for the opinion of this Court. On the 12th November, 1985 the Prosecutor applied for and obtained a Conditional Order of Certiorari to quash the said conviction. The Respondent has shown cause and the matter now comes before the Court to make the Order absolute notwithstanding such cause shown.

The Prosecutor relies upon the State (Director of Public Prosecutions) .v. O'huadghaigh, an unreported judgment of O'Hanlon delivered on the 30th January, 1984. In that case the accused had pleaded guilty to an offence triable summarily only if the Director consented. The Respondent disposed of the matter although no evidence was given of the consent of the Director to his so doing. His Order was quashed as having been made without jurisdiction. The Respondent relies upon The State (McEvitt) .v. Delap 1981 I.R. 125. In that case the Prosecutors as here were charged with an offence for which the possible penalties upon conviction varied

depending upon whether the conviction was a summary conviction or a conviction upon indictment. They informed the District Justice that they wished to go forward for trial by jury. The Director objected upon the grounds that he had decided that the charges should be disposed of summarily. The District Justice adjourned the proceedings and the Prosecutors then sought to prohibit a summary trial on the ground that, although the offence was a minor offence, the provision for different penalties entitled them to trial by jury which could not be taken from them at the option of the Director. The proceedings were unsuccessful. It was held that since the offence was a minor offence, no right to trial by jury at the request of the Prosecutors arose unless such was conferred by statute which it was not. With regard to the varying penalties depending upon the Court in which the conviction was obtained O'Higgins C.J. said at page 131:-

"In my view, the fact that the prosecution is given the right to proceed by indictment as an alternative to summary trial is irrelevant to the issues and considerations which arise in this appeal. A similar right as to choice of prosecution exists in the case of common assault or assault contrary to common law; this matter was fully dealt with in the judgment of the President of the High Court which was delivered on the 29th November, 1976, in *The Attorney General (O'Connor) v. O'Reilly*."

In the latter case, *Finlay, P.* as he then was held that the choice of the method of prosecution for assault, whether under the terms of Section 42 of the Offences Against the Person Act, 1861 as amended by Section 11 of the Criminal Justice Act, 1951 or under those of Section 47 of the 1861 Act was a matter to be decided by the Complainant or the Prosecution and that the accused did not have the right to choose between summary prosecution and

prosecution upon indictment.

The State D.P.P. .v. O'huadghaigh is a different case from the present. There the offence was an indictable offence which could be tried summarily by virtue of the provisions of Section 2 (2) of the Criminal Justice Act 1951 as amended. It was an essential proof of that section that the Director of Public Prosecutions had consented to the Defendant being so tried. No such statutory requirement exists in the present case.

The present case is dependent upon a consideration of the principles established in The State (McEvitt) .v. Delap and in The Attorney General (O'Connor) .v. O'Reilly. Both cases deal with the rights of the accused to control the Court of Trial. Each uphold the sole right of the prosecution to determine this matter. Neither deals with the manner in which the prosecution must elect, but it follows that if this is no concern of the defence then such election need not be expressed in any particular way. If so, then it is not a necessary proof. Accordingly, there is nothing required of the prosecution vis a vis the defence which can result in a failure to prove its case. Nor is there anything in Section 112 (2) which provides that in any particular circumstance the Court before which the charge is brought should refuse jurisdiction.

The real issue in these proceedings is one of jurisdiction. If the matter is brought by way of complaint before the District Justice as a matter of summary jurisdiction he does not lose jurisdiction to hear the matter because there is no evidence before him of the election by the Director to such procedure. Equally in the absence of such evidence the Circuit Court will not lose jurisdiction if the procedure adopted is to seek a return for trial to that Court.

The submissions on the part of the Prosecutor challenge the

validity of the circular issued on behalf of the Director. In my view, this circular is immaterial. The District Justice either has jurisdiction or he has not. Such circular neither adds to nor subtracts from his jurisdiction. I will allow the cause shown and discharge the Conditional Order.

Henry Baron
23/7/66