

THE HIGH COURT

[2022] IEHC 209
RECORD NO. 2022/27/CA

BETWEEN

PHILLIP MARLEY

APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

EX TEMPORE JUDGMENT of Ms. Justice Niamh Hyland delivered on 30 March 2022

Introduction

1. This is an application in respect of a preliminary issue i.e. whether the High Court has jurisdiction in respect of an appeal that has been lodged by the appellant against a decision of President Ryan in the Circuit Criminal Court of 31 January 2022 refusing to sever an indictment.
2. The appellant, who is unrepresented, is currently before the Circuit Criminal Court awaiting trial in respect of Bill Number 1527/21 whereby he is charged with 8 counts relating to registration of a false deed, fraudulent procurement of entry to the register held at the Property Registration Authority, thefts contrary to s.4 of the 2001 Act and money-laundering.
3. The charges relate to and/or arise out of the alleged fraudulent registration of 2 different properties.
4. The appellant made an application to sever the indictment so that the counts in respect of each property would be contained in 2 indictments. As identified above Ryan P. refused that application. The appellant now seeks to appeal the refusal by way of notice of motion seeking an Order under s.6(1) of the Criminal Justice (Administration) Act 1924 to amend the indictment and an Order under s.6(3) of the same Act to separate the charges against him into 2 trials.
5. That section allows a trial court to amend an indictment but does not set out any right of appeal against a refusal of such an application.
6. The objection of the DPP to this application is twofold. First, it is argued that the High Court has no jurisdiction in relation to any appeals from the criminal division of the Circuit Court. Second, it is argued that even if that were not the case, no appeal lies from a decision made in the course of a trial and that appeals only lie from a conviction and/or sentence.

Absence of High Court jurisdiction

7. Counsel for the DPP points out that s.63 of the Courts of Justice Act 1924 provides that an appeal shall lie from the Circuit Court in all cases tried on indictment to the Court of Criminal Appeal. She identifies that the only specific legislative provisions for an appeal are those under s.3(1) and s.3(2) of the Criminal Procedure Act 1993, which only provide for the Court of Criminal Appeal to hear appeals against conviction and/or sentence.

8. Counsel also points out that that jurisdiction was transferred to the Court of Appeal in 2014 under s.8 of the Court of Appeal Act 2014. That section does not enlarge the jurisdiction of the Court of Appeal or limit it but simply confers any jurisdiction previously enjoyed by the Court of Criminal Appeal on the Court of Appeal.
9. Therefore, insofar as the appellant is seeking to appeal a decision of the Circuit Court in respect of a criminal trial, he has failed to identify any provision that would confer jurisdiction on the High Court in this respect. The appellant relies on the fact that there is a right of appeal from the Circuit Court to the High Court and says that it is unjust that there should be no equivalent right of appeal to the High Court in respect of a criminal matter. However, the jurisdiction of the High Court in relation to decisions made by the Circuit Court arises by way of s.38 of the Courts of Justice Act 1936. That section clearly gives jurisdiction to the High Court in respect of civil cases from the Circuit Court. It does not confer any appeal jurisdiction on the High Court in respect of criminal matters.
10. Therefore, I am satisfied that even if an appeal lay against the refusal of an application to sever, that appeal would lie to the Court of Appeal. I am persuaded that I have no jurisdiction as a High Court Judge to entertain this appeal.

No right against decisions made in the course of a criminal trial

11. A separate objection is raised by the respondent to this appeal to the effect that there is no right of appeal in respect of a decision refusing severance, where the decision was made in respect of an application in the course of a trial. Counsel for the DPP argues that a criminal trial is a unitary matter and appeals only lie in respect of convictions and/or sentences as per the provisions of the Criminal Procedure Act referred to above.
12. Counsel notes that there is now a specific provision to make decisions in the context of pre-trial hearings including applications to sever an indictment under the Criminal Procedure Act 2021 which came into force in March 2022. She points out that s.6(8)(d) provides that there is no right of appeal in respect of any such decision pending the conclusion of the trial of the offence.
13. It is accepted that that s.6(8)(d) does not apply to the instant situation since it predates the coming into force of that statutory provision. Nonetheless, counsel for the DPP relies upon it, arguing that it confirms in legislation the existing practice.
14. Counsel also points out that the President of the Circuit Court agreed to hear the application considerably in advance of the trial (the trial being listed for 2024) in order to assist him. However, she says this did not create a stand-alone right of appeal against the ruling.
15. In support of his right to appeal this ruling, the appellant refers to his being given liberty to take up the DAR by the President. By giving the appellant access to the DAR the President was not in my view endorsing his right to appeal. Moreover, even if this was the case, the President of the Circuit Court cannot expand the jurisdiction of the High Court.

16. I should say first that I do not consider the 2021 Act to be of any assistance one way or another in deciding this point. In view it cannot be treated as confirmatory of the law prior to its enactment or used as an aid to the interpretation of s.63 of the 1924 Act.
17. The appellant cannot point to any statutory provision which entitles him to appeal against a ruling made in the course of the trial. The 1993 Act as identified above provides for an appeal against conviction and an appeal against sentence. No appeal is provided for in respect of a pre-trial decision.
18. A general jurisdiction is given to the Court of Criminal Appeal by s.63 of the Courts of Justice Act 1924 , discussed above. This provides that an appeal shall lie from the Circuit Court in all cases tried on indictment to the Court of Criminal Appeal. The wording is somewhat ambiguous because it refers to appeals from the Circuit Court "*in all cases tried on indictment*" and on one reading does not necessarily circumscribe the particular type of appeal. Nor do the provisions of the 1993 Act necessarily exclude appeals against matters other than convictions and sentence.
19. However, it seems to me unnecessary to go any further in this analysis since I have already concluded that the High Court has no jurisdiction in relation to any type of appeal from the Circuit Court in the criminal sphere, due to the very provisions of s.63.
20. The appellant has also raised issues of compatibility of the legislation with the European Convention on Human Rights, in particular Article 6(3) of the Convention, and the Constitution. If the constitutionality of legislation or its compatibility with the Convention is to be put in issue, this must be done by way of plenary proceedings or, in certain circumstances, by way of judicial review. It is not open to me, in the context of an appeal where I enjoy no jurisdiction to hear same, to address constitutional and Convention issues.
21. Equally, the applicant urges me to reject the preliminary objection on the basis that it is not consistent with logic that the High Court should have no jurisdiction. My task is not to decide upon the desirability of the scheme established by the legislature but rather to consider the legality of the scheme. Those arguments therefore cannot be used therefore to identify a basis for the High Court to assume jurisdiction in circumstances where such jurisdiction does not otherwise exist.
22. In those circumstances I accede to the application of the respondent to decline jurisdiction to entertain the notice of motion brought by the appellant.

Stating a case

23. The appellant also asked me to state a case to the Supreme Court pursuant to s.38(3) of the 1936 Act. That section was relatively recently considered by the Supreme Court in *Irish Life and Permanent v Dunne* [2015] IESC 46 in the context of a civil matter. The wording of s.38 is in my view unambiguous. It applies only to civil matters and not criminal matters and therefore does not provide a basis upon which a case could be stated from the High Court to the Supreme Court in a criminal matter.

Conclusion

24. In conclusion I find that the High Court has no jurisdiction to entertain the appeal and I therefore dismiss same.