



# THE COURT OF APPEAL

Record Number: 2021 68  
Neutral Citation: [2021] IECA 164

Birmingham P.  
McCarthy J.  
Kennedy J.

## **UNAPPROVED**

IN THE MATTER OF SECTION 16 OF THE COURTS OF JUSTICE ACT, 1947

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR

- AND -

NIKITA BROGAN

ACCUSED

**JUDGMENT of Ms. Justice Isobel Kennedy delivered (via electronic delivery) on the 3rd day of June 2021**

1. This is a consultative case stated by Judge Martin Nolan from the Dublin Circuit Criminal Court. On application by the prosecutor, the judge asks the following questions:-
  - i. Where an accused is being sent forward for trial from the District Court is service of the book of evidence on the accused's solicitor adequate in order to comply with sections 4A and 4B of the Criminal Procedure Act 1967 (as amended)?

- ii. If the answer to question (i) is yes, what manner of service is required in order to comply with sections 4A and 4B of the Criminal Procedure Act 1967 (as amended)?

### **Background**

2. On the 15<sup>th</sup> January 2021 the accused's case was listed before Dublin Metropolitan District Court for service of a book of evidence on foot of a charge contrary to s.10 of the Criminal Law (Jurisdiction) Act, 1976. The accused was to appear in court via video-link from the Dóchas Centre. The accused's solicitor, Mr McGarry was present in court. Before the case was called the prosecution solicitor from the office of the Chief Prosecution Solicitor indicated to Mr McGarry that the book of evidence was ready to be served. The parties agreed that they would consent to having the matter adjourned to the following week so that the accused could be produced in court on that date.
3. When the matter was called, Mr McGarry conveyed to the Court that there was consent to adjourn the case to the following week. However, the District judge noted that the Dóchas Centre was in lockdown and that may continue to be the position for a number of weeks and it was therefore unlikely that the accused would be produced in court the following week.
4. The Court suggested sending the accused forward via video-link and referred to the recently enacted Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 which made provision for the sending forward of an accused via video-link. Indeed, the provision permitting for an accused to be sent forward by video-link formed the origin of this consultative case stated. The District judge further noted that the service of the book of evidence on the accused's solicitor was provided for in the Criminal Procedure Act 1967.
5. The District judge asked the accused's solicitor if he had any difficulty with the defendant being sent forward via video-link and being served the book of evidence. Mr

McGarry consulted with the accused and she took no issue with what was being proposed.

Mr McGarry then informed the Court that he had no issue with accepting service of the book of evidence on the accused's behalf.

6. Sergeant Paul Keane then served the book of evidence on Mr McGarry by handing it to him. Sergeant Keane completed the declaration of service on the court's copy of the book of evidence and handed it to the court clerk.

**The relevant legislation**

7. Section 4A(5) of the Criminal Procedure Act 1967, as amended states as follows:-

“(5) The accused shall not be sent forward for trial under subsection (1) until the documents mentioned in section 4B(1) have been served on the accused.”

8. Section 4(B)1 provides:-

“(a) Subject to subsection (3), the prosecutor shall cause the documents specified in paragraph (b) to be served on the accused or his or her solicitor (if any) not later than 42 days from the date on which—

(i) the accused, on being informed by the District Court of his or her right to be tried by a jury, objects to being tried summarily or the prosecutor informs the court that he or she does not consent to the person being tried summarily for the offence concerned or,

(ii) in the case of an offence in respect of which the prosecutor may elect to prosecute either summarily or on indictment, the prosecutor elects to try the offence on indictment, or

(iii) the District Court determines that the facts alleged do not constitute a minor offence and are not fit to be tried summarily.

(b) The documents referred to in paragraph (a) are:

(i) a statement of the charges against the accused;

- (ii) a copy of any sworn information in writing upon which the proceedings were initiated;
- (iii) a list of the witnesses the prosecutor proposes to call at the trial;
- (iv) a statement of the evidence that is expected to be given by each of them;
- (v) a copy of any document containing information which it is proposed to give in evidence by virtue of Part II of the Criminal Evidence Act 1992;
- (vi) where appropriate, a copy of a certificate under section 6(1) of that Act;
- (vii) a list of the exhibits (if any).”

**Contention of the prosecution**

**9.** The prosecution puts forward three bases of statutory interpretation that would allow the first question posed to this Court to be answered in the affirmative. The first basis is reading s. 4A(5) in its legal context. The phrase “service on an accused” must be seen in the context of Part 1A as a whole and read as including service on an accused’s solicitor.

**10.** The second basis is that if s. 4A(5) required personal service on an accused prior to the return for trial, this would amount to an absurdity, as referred to in section 5 of the Interpretation Act 2005 which provides as follows:-

“(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—

(i) in the case of an Act to which paragraph (a) of the definition of “Act” in section 2 (1) relates, the Oireachtas, or

(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole.”

**11.** The reference to “solicitor” throughout Part 1A would be rendered nugatory as service on a solicitor would be pointless because personal service on the accused would be required prior to a valid return for trial.

**12.** The third basis for interpretation arises if the 1967 Act is considered to fall within the exceptions outlined in s.5 of the Interpretation Act 2005 and it is a purposive interpretation. It is well established that penal statutes can be subject to a purposive interpretation. One such example is *DPP (Ivers) v. Murphy* [1999] 1 IR 98 which concerned section 6(1) of the Criminal Justice (Miscellaneous Provisions) Act, 1997.

Denham J. ( as she then was) allowed a purposive interpretation and stated as follows:-

“The rules of construction are part of the tools of the court. The literal rule should not be applied if it obtains an absurd result which is pointless and which negates the intention of the legislature. If the purpose of the legislature is clear and may be read in the section without rewriting the section then that is the appropriate interpretation for the court to take.

Section 6 was introduced by the legislature to enable evidence of arrest, charge and caution be given by certificate if the accused is arrested otherwise than under a warrant. This obviates the necessity of the arresting guard being in court. However, if the arresting guard has to be in court to give evidence that the arrest was otherwise than under a warrant before the certificate is professed in evidence, there is the absurd result that the garda is required to be in court to prove that his presence is not required!

...In reaching this conclusion, in construing the section in light of the full process, it is an important factor that the purpose of the legislature in passing the section was to enable a certificate to be utilized to avoid the necessity of the arresting guard giving oral evidence of arrest, charge and caution, thus the section is rendered absurd if that same guard is required to give evidence that it was not an arrest by warrant. The intention of the legislature was to avoid the necessity of the garda attending court at this stage of the process...On a purposive interpretation of the statute, s. 6(1) does not require an oral history before admitting the certificate as evidence of the matters stated therein.”

13. In terms of how the documents should be served, it is submitted that a book of evidence may be considered a “notice” as referred to in section 7 of the Courts Act 1964 and accordingly, the provisions of Order 41, rules 3 to 19 of the District Court Rules provide for the manner in which it can be served on an accused or her solicitor.

#### **Submissions of the defendant**

14. The approach of the defendant taken on behalf of the defendant is one of assistance and in that respect it is submitted that the purposive interpretation approach put forward by the prosecution may be the best basis upon which this Court can conclude that the case stated should be answered in the manner suggested by the prosecution.

15. Insofar as the mode of service is concerned Mr Carroll SC for the defendant says that in practical terms should the Court answer the first question in the affirmative, then the likelihood is that the solicitor for a defendant will be present in court to take service of the documents.

#### **Discussion**

16. Blayney J. in *Howard v. Commissioners for Public Works* [1994] 1 IR 101 cited with approval the following from Craies on Statute Law (7<sup>th</sup> Edition, 1971, at p.65):-

“The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense.”

### **The Legislation**

**17.** Proceedings concerning indictable offences, not dealt with summarily fall within Part 1A of the Criminal Procedure Act 1967 (as inserted by s.9 of the Criminal Justice Act, 1999). The relevant provisions extend from s.4A to s.4Q of the 1967 Act as amended. Section 4A is concerned with sending an accused forward for trial, where the Court is mandated to send the accused forward for trial unless certain situations apply as set out pursuant to that provision while section 4B addresses the service of specified documents on an accused. An accused shall not be sent forward for trial unless the documents hereunder have been served on the accused.

**18.** Section 4B(1)(b) sets out those documents, which are colloquially referred to as the Book of Evidence and include:-

- (i) “a statement of the charges against the accused;
- (ii) a copy of any sworn information in writing upon which the proceedings were initiated;
- (iii) a list of the witnesses the prosecutor proposes to call at the trial;
- (iv) a statement of the evidence that is expected to be given by each of them;
- (v) a copy of any document containing information which it is proposed to give in evidence by virtue of Part II of the Criminal Evidence Act 1992;
- (vi) where appropriate, a copy of a certificate under section 6 (1) of that Act;
- (vii) a list of the exhibits (if any).”

19. Order 24 of the DCR 1997 governs *inter alia* the procedure for the service of the documents on an accused where the individual is not being tried summarily.

20. For the purposes of the first question the focus rests with sections 4A(5), 4B(1), 4C, 4D and 4E(6) of the 1967 Act. It can be said that, with the exception of section 4A(5), the above-mentioned provisions refer to service of documents on the accused or his or her solicitor. Section 4A(5) of the 1967 Act states as follows:-

“(5) The accused shall not be sent forward for trial under subsection (1) until the documents mentioned in section 4B(1) have been served on the accused.”

21. Section 4A(5) speaks of service on **the accused**. Does this then mean that service of the documents set forth in Section 4B(1)(b) must be served on the accused and not on the accused or his or her solicitor?

22. Statutory interpretation involves the assessment of the intention of the legislature and the intention of the legislature may be derived from the words used. As stated by Kelly J. in *O'Dwyer v. Keegan* [1997] 2 ILRM 401:-

“The intention, and therefore the meaning, of an Act is primarily to be sought in the words used. They must, if they are plain and unambiguous, be applied as they stand... If there is nothing to modify, alter or qualify the language which is contained in the Act, then the words and sentences must be construed in their ordinary and natural meaning.”

23. I do not believe there is anything at all complicated or unclear about this section. Section 4A is concerned with sending an accused forward for trial and mandates that the accused be sent forward to the court of trial unless *inter alia* the case is being dealt with other than on indictment or where the consent of the prosecutor is not forthcoming. I am quite satisfied that S4A(5) is designed to ensure that an accused shall not be sent forward



without first having been served with the documents specified in Section 4B(1)(b). As observed in *Howard v. Commissioners for Public Works* [1994] 1 IR 101

“The pre-eminent indicator of the legislature’s intention is the text actually chosen by the legislature itself to indicate its intention.”

**24.** Where the words in a statute are plain and clear, there is no need to apply any complex rules of interpretation. When I examine Section 4A, it is readily apparent that the section is addressed to that of sending an accused forward for trial and that this cannot occur unless the accused has been served with the relevant documents. The service of the relevant documents is a precondition which must be fulfilled before an accused may be sent forward for trial. Further support may be drawn from this conclusion by virtue of the terms of Section 4B, which section, as we shall see below, is concerned specifically with the service of documents on an accused.

#### **Service of documents**

**25.** Section 4(B)1 provides:-

“(a) Subject to subsection (3), the prosecutor shall cause the documents specified in paragraph (b) to be served **on the accused or his or her solicitor** (if any) not later than 42 days from the date on which ----”(my emphasis)

**26.** Order 24 r.7 of the DCR provides for service on the accused or his solicitor, while Order 24 r.10 in addressing the procedure concerning the order sending forward for trial, refers to service on the accused.

**27.** Section 4A(5) and Order 24 r. 7 are concerned with sending the accused forward for trial which order cannot be made unless the book of evidence has been served on the accused. However, section 4A(5) is not concerned with how such service can be effected, rather, the wording clearly provides that an accused shall not be sent forward unless the book of evidence is served on the accused.

**28.** When section 4A and section 4B are read together, the logical conclusion is that section 4A mandates that the documents set out in section 4B be served on the accused as a precondition to sending him or her forward and section 4B provides specifically for the service of the documents and permits such service on the accused or the solicitor. The dicta of McKechnie J. in the *Minister for Justice v. Vilkas* [2018] IESC 69 are apposite:-

“It follows that the express terms of the statute itself are the best indicator of this objective intention: thus the primary route by which such can be ascertained is by construing the words used in their ordinary and natural meaning. This is the ‘literal approach’. If such words used are clear and unambiguous, they should be given their plain meaning: then the task is at its end.

That is not to say, however, that the words of the section in question can be read divorced from the context in which they appear: this context may include, inter alia, the rest of the sentence or sentences joined therewith, the other sub-sections of the provision, other sections within the relevant Part of the Act, the Act as a whole, and even, on occasion, the legislative history of the Act. Consideration of the context forms a part of the literal approach.”

**29.** Thus additional support may be gathered from section 4C which provides for the service of additional documents on the accused or his solicitor, section 4D which permits of the right to inspect all exhibits mentioned in the list of exhibits served on the accused or his solicitor and section 4E (6) which permits the service of any document required under Part 1 on the accused or his solicitor at the hearing of an application for the dismissal of charge under that provision.

**30.** Moreover, the insertion of the words “or on his or her solicitor” in the various provision under Part 1 would be entirely superfluous and utterly meaningless if the words

used did not mean what they say, and that is that service is permitted under the statute on the accused or on his or her solicitor.

**31.** I am quite satisfied that the overall scheme and intention of Part 1A of the 1967 Act is to permit service on an accused or on his or her solicitor and accordingly I would answer the first question in the affirmative.

**Mode of Service**

**32.** The second question asked concerns the manner of service required in order to comply with the terms of sections 4A and 4B of the Act of 1967.

**33.** The 1967 Act as amended is silent regarding a definition of what may constitute service. As we have seen section 4B(5) simply states “to be served”. Service is a procedural matter and Order 24 of the DCR prescribes the procedures relating to proceedings concerning indictable offences which are not tried or dealt with summarily in the District Court. However, Order 24 r. 6 does not specify the manner of service but simply states:-

“Where an accused person is before the Court charged with an indictable offence not being dealt with in accordance with rules 1,2,3 or 5 hereof and the prosecutor consents to the accused being sent forward for trial the Judge shall remand the accused to a further sitting of the Court to allow service of the documents specified in section 4B(1) of the Act.”

**34.** The Director relies on O.24 r.7 which provides:-

“The documents specified in section 4B(1) of the Act shall be in accordance with Forms 24.3 to 24.7, Schedule B and shall be served personally upon the accused or upon his solicitor, if any, at the earliest opportunity, but shall not, subject to any extension granted by the Court in accordance with section 4B(3) of the Act, be

served later than 42 days from the date on which [the decision to try on indictment is made].”

**35.** Mr Dwyer SC for the Director argues that service may be effected in accordance with the DCR and in particular O. 41 rules 3 to 19 thereof.

**36.** Order 10 rule 6 of the DCR (as amended by SI 17/2014) provides:

“The provisions of Order 41, rules 3 to 19 inclusive as regards mode of service, service on particular parties, proof of service and related matters, apply with the necessary modifications in criminal proceedings in the Court.”

**37.** Therefore Order 41 applies to modes of service of documents in criminal proceedings with the necessary modifications.

**38.** Order 41 concerns in general the service of documents. Order 41 r. 1 provides:-

“1. In this Order –

a “document” means “a “District Court document” within the meaning of section 7(1) of the Courts Act 1964.”

**39.** Section 7(1) of the 1964 Act as amended by s.22 of the Courts Act 1971 provides *inter alia*:-

(1) In this section....

“District Court document” means any document by which proceedings in the District Court (other than proceedings by way of summons in which the complainant is a member of the Garda Síochána, a Minister of State, an officer of such a Minister, the Attorney General or an officer of the Revenue Commissioners) are instituted and any other document relating to such proceedings which is a notice, order or witness summons.”

**40.** While ‘notice’ is not defined in the 1964 Courts Act, it is said on the part of the Director that notice must include the book of evidence in that the book of evidence provides ‘notice’ of the evidence to be adduced at trial to the accused person.

**41.** If this is so, then Order 41 provides for service on an accused’s solicitor in terms of rule 11 thereof which says:-

“11 (1) Service of a document must be deemed good service if the Court is satisfied that a solicitor acting on behalf of the person to be served has accepted service of the document.”

**42.** The relevant portions of Section 7 (1) of the 1964 Act as amended by section 22 of the Courts Act 1971, refers to a document by which proceedings in the District Court are instituted **and** any other document relating to such proceedings which is a notice. The question is what constitutes ‘a notice’?

**43.** Order 41 provides for various modes of service, which include personal service and service on a solicitor. Order 41 rule 4 provides for personal service of a document in accordance with the terms of section 7 of the Courts Act 1964.

**44.** Service may be deemed good service on a solicitor if the court is satisfied the solicitor accepted service. Service may also be effected on the solicitor by

- (a) by delivering a copy of the document to the solicitor; or
- (b) by leaving a copy of the document at the solicitor’s office; or
- (c) by sending a copy of the document by post in an envelope to, the solicitor; or
- (d) by sending a copy of the document to a document exchange service designated by that solicitor in accordance with sub – rule (3) through which that solicitor accepts documents.

*Does the word “notice” include documents referred to in section 4B(1)(b)?*

45. These documents are commonly referred to as the book of evidence and in *The People (Attorney General) v Cummins* [1972] IR 312, Walsh J. observed as follows:-

“The expression "book of evidence" has no statutory warrant, but it is the term commonly used to describe the documents which are required by s. 6 of the Act of 1967 to be served upon an accused by the prosecutor... In so far as those documents consist of statements of the evidence proposed to be given by a witness at the preliminary examination, they are not admissible for any purpose at the trial of an accused if he be sent forward for trial...”

46. While section 10(2) of the Criminal Justice Act 1999 repealed section 6 of the 1967 Act, the documents referred to in section 4B(1)(b) incorporate the documents set out under s. 6. The words used by Walsh J. are instructive in that the book of evidence consists of ‘evidence proposed to be given’ albeit not at present in the context of the preliminary examination, given its abolition, but at trial.

47. Notice may be said to constitute advance warning and in the present circumstances, I am satisfied that notice includes ‘the book of evidence’, being the documents specified in s.4B. I draw support for this contention from the words in the section, in particular where reference is made at section 4B(1)(b)(iii), (iv) and (v) to:-

- “(iii) a list of the witnesses the prosecutor *proposes* to call at the trial;
  - (iv) a statement of the evidence that *is expected* to be given by each of them;
  - (v) a copy of any document containing information which it is *proposed* to give in evidence by virtue of part II of the Criminal Evidence Act 1992”
- (emphasis added)

48. Accordingly, I am satisfied that the documents specified in section 4B(1)(b) of the Criminal Procedure Act, 1967 as amended constitute ‘notice’ as defined in Section 7(1) of the Courts Act 1964 as amended by section 22 of the Courts Act 1971.

**49.** Service may therefore be effected in accordance with Order 41 of the rules of the District Court with the necessary modification that service should be effected either by way of personal service on the accused or on his or her solicitor in terms of Order 41 rule 4 or Order 41 rule 11(1), (2)(a) or (b).

**50.** Accordingly, I would answer the second question in the following manner:-

Service may be effected in accordance with Order 41 of the District Court Rules, rules 4; 11(1); 11(2)(a) or 11(2)(b).

**51.** My colleagues Birmingham P. and McCarthy J. have confirmed agreement with this judgment.