

IRELAND / JUDGMENT

G. E. -v- DPP [2008] IESC 61 (30 October 2008)

[2008] IESC 61

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

[Home] [Databases] [World Law] [Multidatabase Search] [Help] [Feedback] [DONATE]

Supreme Court of Ireland Decisions You are here: BAILII >> Databases >> Supreme Court of Ireland Decisions >> G. E. -v- DPP [2008] IESC 61 (30 October 2008) URL: <https://www.bailii.org/ie/cases/IESC/2008/S61.html> Cite as:

[2009] 1 IR 794,

[2008] IESC 61,

[2009] 1 IR 801 [New search] [Help] Judgment Title: G. E. -v- DPP Neutral Citation:

[2008] IESC 61 Supreme Court Record Number: 329/07 High Court Record Number : 2006 1495 JR Date of Delivery: 30 October 2008 Court: Supreme Court Composition of Court: Denham J., Hardiman J., Kearns J. Judgment by: Kearns J. Status of Judgment: Approved Judgments by Result Concurring Kearns J. Appeal allowed - set aside High Court Order Denham J., Hardiman J. Outcome: Allow And Set Aside THE SUPREME COURT Denham J. Hardiman J. Kearns J. [RECORD NO: 329 of 2007] BETWEEN G. E. APPLICANT AND THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT Judgment of Mr. Justice Kearns delivered the 30th day of October, 2008. This matter comes before the Court by way of appeal from the refusal of the High Court (Murphy J.) on 12th October, 2007 to restrain the respondent from maintaining a prosecution against the applicant on a charge of rape contrary to s. 48 of the Offences Against the Person Act, 1861 and s. 2 of the Criminal Law (Rape) Act 1981 as amended by s. 21 of the Criminal Law (Rape) (Amendment) Act 1990. The complainant and the applicant in this case were slightly acquainted and happened to meet outside a disco in Wexford on the night of 21st February, 2003. A sexual encounter took place between the applicant and the complainant some short time later in a van in the centre of Wexford. The applicant had borrowed the keys to the van from a friend and both he and the complainant walked to the van where some kissing quickly developed into a more intimate event which involved the removal of the complainant's clothing and an attempt at least at full penetrative intercourse by the applicant. The complainant subsequently alleged that the respondent had raped her, whereas at all times the respondent maintained that any sexual contact between them was consensual in nature. The applicant was born on 29th April, 1982 and was thus 20 years of

age on the night in question. The complainant was born on 13th March, 1986 and was thus three weeks short of her seventeenth birthday at the time of the incident. The Garda Síochána commenced an investigation into the incident. The applicant presented himself at the local garda station shortly after he became aware that the complainant had accused him of rape and made a detailed statement. On 10th October, 2003 the State Solicitor forwarded the garda file to the office of the respondent. Upon receipt of the file in the respondent's office it was assigned to a professional officer who proceeded to consider it. On 14th November, 2003 the professional officer in the respondent's office directed that the State Solicitor obtain a forensic report in the case. On 3rd February, 2004 the professional officer made a submission to Mr. David Gormally, also a professional officer in the respondent's office, though presumably of more senior rank, in which he stated that there was no prospect of securing a conviction for rape or attempted rape and he suggested a prosecution for an offence contrary to s. 2(2) of the Criminal Law Amendment Act 1935. Having considered the file, Mr. Gormally agreed with the submission and on 6th February, 2004 the professional officer directed the State Solicitor that a s. 2(2) prosecution be brought against the applicant. The direction indicated that if the accused wished to plead and be sentenced in the District Court that the respondent would consent to same, but that otherwise the matter was to be sent forward for trial to the Circuit Criminal Court. By summons dated 16th February, 2004, the applicant was charged with attempted unlawful carnal knowledge, contrary to s. 2(2) of the Criminal Law Amendment Act 1935 as amended by s. 13 of the Criminal Law Act, 1997. The maximum sentence following conviction for this offence is two years: see sections 10 and 13 of the 1997 Act. On 5th April, 2004 the applicant's solicitor was informed by an inspector of An Garda Síochána that the respondent had directed summary disposal of the charge if the applicant were to plead guilty. On 6th December, 2004 the applicant was put on his election at Wexford District Court and he elected for trial on indictment. The case was adjourned to 28th February, 2005 for service of the Book of Evidence. On 28th February, 2005 the Book of Evidence was served and the applicant was sent forward for trial to the Circuit Court. The case first came before the Circuit Criminal Court on 19th April, 2005 and thereafter was adjourned from time to time pending the judgment of the Supreme Court on the constitutionality of s. 1(1) of the Criminal Law (Amendment) Act 1935 in the case of *CC v. Ireland*, the Attorney General and the Director of Public Prosecutions

[2006] 4 IR 1 . All of these adjournments were by consent and the applicant was on bail at all material times. On 23rd May, 2006 this Court delivered judgment in the CC case in the course of which s. 1(1) of the Criminal Law Amendment Act, 1935 was declared unconstitutional. In the aftermath of the decision a number of habeas corpus applications were brought in respect of persons in custody. Because of some uncertainty concerning the consequences of the CC decision, it became clear that there would have to be further clarification as to the legal position and such clarification was thereafter provided by the judgment of this Court in *A. v. Governor of Arbour Hill Prison*

[2006] 4 IR 88 . On 23rd June, 2006 the respondent's Deputy Director directed that the judgment in the A case should be awaited before any decision was made on what should happen in the instant case. In his affidavit sworn in the proceedings herein, David Gormally states that at that stage the possibility of a charge of rape was not being considered so that the file was being dealt with on the basis that there was no alternative charge and that the sole issue was the status of the s. 2(2) charge in the light of what the Supreme Court had decided in the CC case and might yet decide in the A case. On 29th June, 2006 the Deputy Director noted that it was likely the case would have to be dropped but said that it should be resubmitted to the Director when the judgment in A was forthcoming. On 29th June, 2006, the Director agreed with this approach. On 10th July, 2006 the Supreme Court delivered its judgment in the A case following which Mr. Gormally considered the file again. Having done so and without any new or additional evidence, Mr. Gormally decided there was a case for bringing a rape charge and for not proceeding with the s. 2(2) charge. On 20th July, 2006 the Director considered the file and was inclined to prosecute for rape or attempted rape. On 2nd August, 2006 Mr. Gormally considered the Director's decision and suggested that on the facts of the case rape was a more appropriate charge than attempted rape. On 12th September, 2006 the Director, having considered the matter again, agreed and directed that a charge of rape be brought and that the s. 2(2) charge be dropped. On 12th September, 2006 the professional officer who was reporting to Mr. Gormally prepared a written direction to the State Solicitor setting out the decision of the respondent to charge the applicant with rape and to discontinue the prosecution in respect of s. 2(2) of the Criminal Law Amendment Act 1935. On 3rd October, 2006 a nolle prosequi was entered in respect of the section 2(2) charge. On 10th October, 2006 the applicant was rearrested and charged with rape before the District Court in New Ross. The maximum sentence following conviction for this offence is imprisonment for life. On 18th December, 2006 the applicant sought and obtained leave from the High Court (Peart J.) to bring the present judicial review proceedings. The same were heard and determined in the High Court (Murphy J.) on 12th October, 2007. Various grounds were relied upon by the applicant in seeking prohibition of the trial. One of those grounds was delay. However, this ground of complaint was dismissed by the learned High Court Judge and has not been further argued in the course of the appeal before this court. Secondly, it was argued that the substitution of the rape charge for the attempted unlawful carnal knowledge charge was, having regard to the contents of Mr. Gormally's affidavit, a breach of the respondent's own guidelines and further that such alleged breach constituted unfair procedures in relation to the prosecution of the case such that the applicant was entitled to restrain his further prosecution. In the course of his ex-tempore judgment, Murphy J. rejected these arguments also, holding that the guidelines were not rules of law. Rather than making any precise finding on the suggestion that unfair procedures had not been followed in the case, the learned trial judge held that the relevant test was whether or not there was a real or serious risk of an unfair trial arising from the respondent's altered decision whereby a rape charge was substituted for one of attempted unlawful carnal knowledge. He was not satisfied that such a case had been made out and refused to grant relief to the applicant. In

the course of the appeal to this court, Mr. Jeremy Maher, Senior Counsel for the applicant, argued that the learned trial judge had applied the wrong test. The test was not to determine whether or not an unavoidably unfair trial might take place but rather to inquire whether the decision of the respondent to charge the applicant with attempted unlawful carnal knowledge, then enter a nolle prosequi and subsequently charge the applicant with rape was a breach of fair procedures to such a degree that the prosecution should be restrained. This case, he argued, was analogous to the case of *Eviston v. Director of Public Prosecutions*

[2002] 3 IR 260 in which the applicant had been told by or on behalf of the respondent that she would not be charged with any offence and was subsequently charged with a serious offence. Mr. Maher contended that similar conduct in the present case was both a breach of fair procedures and tantamount to the adoption and deployment of an improper policy on the part of the respondent. **RELEVANT LEGAL PRINCIPLES** The Office of Director of Public Prosecutions was established under the Prosecution of Offences Act, 1974. Section 2 of that Act provides that the Director is independent in the performance of the functions assigned to him under the Act. Traditionally the courts have been extremely reluctant to interfere with the discretion of the Director when deciding to prosecute or not to prosecute, confining interventions to cases where decision were motivated by an improper policy or where mala fides can be established. These general principles were usefully summarised by McKechnie J. in the course of his decision in the case of *Q.(M) v. Judge of Northern Circuit & Director of Public Prosecutions*

[2003] IEHC 88 where he stated at paras. 31 and 32:- “The role of the Superior Courts, when exercising their supervisory jurisdiction, has been considered in the following cases in the context of decisions made by the DPP (see *The State (O’ Callaghan) v. O’ hUadhaigh* [1977] IR 42, *The State (McCormack) v. Curran* [1987] I. L. R. M. and H v. DPP [1994] 2 I. R.). From these judgments the following general propositions emerge:-

- (a) The DPP, when exercising his decision making power, is subject to the Constitution and to the Law,
- (b) For this purpose his decisions are subject to court control though the scope of such permitted review is much more circumscribed than with other persona or bodies carrying out decision making functions,
- (c) Where it can be demonstrated that the decision arrived at was made mala fides, or was influenced by an improper motive or an improper policy, then the courts have power to intervene, and

- (d) The DPP does not have to furnish reasons for his decisions either those that are positive or negative. In *The State (McCormack) v. Curran* [1987] I. L. R. M. 225 and *H v. DPP* [1994] 2 I. R. 589 the Court was only concerned with a challenge on its merits to decisions made by the DPP not to prosecute. There was no question in either case of the decision having been taken on review or of having been communicated to the defendant and no issue arose as to any change of circumstances.” The position in *Eviston v. Director of Public Prosecutions*

[2002] 3 IR 260 was different. The applicant, Mrs. Eviston, was involved in a road traffic accident which involved the death of the driver of the other vehicle. Her car had veered to the incorrect side of the road following the blow-out of a tire. The police investigated the matter and submitted a file to the Director. The applicant also obtained a report from a firm of consulting engineers which confirmed the tire had blown out prior to the accident and sent a copy to the respondent. A decision was made by the Director not to prosecute and the applicant’s solicitor was duly informed by the Gardaí of this decision. This information was in turn communicated to Mrs. Eviston. However, shortly afterwards the father of the deceased man wrote to the Director and requested a review of the documentation, requesting that some charges be brought against the applicant. Following the making of these representations, though without any additional or new evidence, the Director changed his mind and District Court proceedings were issued against Mrs. Eviston alleging dangerous driving causing death. Following the Director’s refusal to give any reasons for his change of mind and prior to any court hearing on the charges, leave was obtained from the High Court permitting the applicant to challenge the validity of the decision to prosecute. In the course of his judgment Keane C. J. expressed the opinion that the Director could review a decision not to prosecute and could change his mind in respect thereof. He further held that it was open to the Director to do this even in the absence of fresh evidence or different factors. He made clear that this was in the public interest given the absence of any appeal process from a decision of the respondent and given his right to refuse to give reasons in respect thereof. He further held that if the reviewed decision had not been communicated to a defendant but somehow had become public knowledge, that fact on its own would not render the decision reviewable by the court. Having identified as critical the communication by the Director of his decision not to prosecute to the person concerned in circumstances where no new material had become available, the Chief Justice was satisfied that the Director’s decision to reverse his original decision was reviewable on the grounds that fair procedures had not been observed. At p. 299 of the report, Keane C. J. stated: - ‘It is, however, beyond argument that the degree of such stress and anxiety to which the applicant was subjected was exacerbated by the decision of the respondent to activate the review procedure in circumstances where he had already informed the applicant that she would not be prosecuted and he had not given her the slightest intimation that this was a decision which would be subjected to review in accordance with the procedures in his office... No reason has been advanced, presumably because none existed, as to why the applicant was not informed that the decision of the respondent not to institute a prosecution might in

fact be reviewed at a later stage. In the result she was subjected to a further and entirely unnecessary layer of anxiety and stress. Viewing the matter objectively, and leaving aside every element of sympathy for the applicant, I am forced to the conclusion that in the circumstances where the respondent candidly acknowledges that there is no new evidence before him when the decision was reviewed, the applicant was not afforded the fair procedures to which, in all the circumstances, she was entitled. It follows that the requirements of the Constitution and the law will not be upheld if the appeal of the respondent in the present case were to succeed.” The case was thus determined on ‘fair procedures’ grounds rather than on grounds of abuse of process, this Court taking the view that there was a disposition evident on the part of the Director to a particular prosecution which had the consequence if not the intent to avoid or circumvent due process. Clearly courts must intervene where circumstances of this nature arise. This was made very clear in the judgment of Finlay P. in *State (O’ Callaghan) v. O’ hUadhaigh*

[1977] 1 I. R. 42. In that case the prosecutor was returned by the District Court to the Circuit Court for trial on eight charges. The Director of Public Prosecutions lodged in the Circuit Court an indictment containing one count and, on his application, the trial of the prosecutor was transferred to the Central Criminal Court. The Director then lodged an indictment containing eight counts and subsequently he lodged another indictment which contained ten counts. A jury was sworn but the prosecutor was not given into the charge of the jury as he had entered a written plea in bar. After legal argument, the trial judge ruled that the only indictment properly before the court was the original single count indictment; whereupon, having taken instructions, counsel for the Director entered a nolle prosequi in regard to all the counts in each of the three indictments and informed the court that the prosecutor, when discharged, would be rearrested and charged again with the same offences. The prosecutor, who had been remanded in custody for six months, was released. Finlay P. made absolute an order preventing the respondent District Justice from proceeding with the renewed charges, holding, *inter alia*, that, in the particular circumstances, the prosecution of the renewed charges would not accord with the standard of fair procedures required by the courts in the administration of justice. At pp. 52 and 53 Finlay P. stated:- ‘If the contention of the respondent in this case is correct, then it means that in any criminal trial the Director, on meeting a situation in which a ruling or proposed ruling by the trial judge on a matter within his discretion at the trial is unsatisfactory, from the point of view of the prosecution, can deal with that problem by entering a nolle prosequi and so avoid the consequences of technical matters that may have arisen in the course of the proceedings up to that time by instituting an entirely fresh prosecution freed from, or cured of, the difficulties which have arisen and which are likely to favour the accused. In the course of his judgment in *The State (Healy) v. Donohue* [1976] I. R. 325 the Chief Justice said at p. 348 of the report:- ‘In the first place the concept of justice, which is specifically referred to in the preamble in relation to the freedom and dignity of the individual, appears again in the provisions of Article 34 which deal with the Courts. It is justice which is to be administered in the Courts and this concept of justice

must import not only fairness, and fair procedures, but also regard to the dignity of the individual. No court under the Constitution has jurisdiction to act contrary to justice. Mr. Justice Gannon in his judgment in this matter in the High Court said:- 'Before dealing with the submissions on the grounds on which the conditional orders were made, I think I should say at the outset that it appears to me that the determination of the question of whether or not a court of local and limited jurisdiction is acting within its jurisdiction is not confined to an examination of the statutory limits of jurisdiction imposed on the court. it appears to me that this question involves also an examination of whether or not the court is performing the basic function for which it is established- the administration of justice. Even if all the formalities of the statutory limitation of the court be complied with and if the court procedures are formally satisfied, it is my opinion that the court in such instance is not acting within its jurisdiction if, at the same time, the person accused is deprived of any of his basic rights of justice at a criminal trial.' I agree with these views.' If this statement of principle (which, of course, I unreservedly accept) applies to the proceedings of a court in trying a criminal case, it appears to me that the same or analogous principles must apply, a fortiori to the exercise by the Director of Public Prosecutions of his statutory powers, and to the interpretation by me of those statutory powers in any particular circumstance." DECISION At the outset it should be stated that this case possesses none of the disquieting factors which were present in *Eviston*. This is not a case where some mysterious or unexplained circumstance surrounds the decision of the respondent to substitute the charge laid against the applicant. No question of *mala fides* arises nor is there any basis for suggesting that the respondent adopted or deployed an improper policy in relation to the proposed prosecution. Nor is this a case in which a decision not to prosecute for any offence had been communicated to the applicant followed by a reversal of that decision. While a *nolle prosequi* was entered in the Circuit Court in respect of the charge of unlawful carnal knowledge, it has not been contended on behalf of the applicant that he believed or was led to believe that any prospect of a criminal prosecution arising out of the incident in *Wexford* was thereby at an end. The applicant, like a number of other people who had a direct stake and interest in the consequences flowing from the CC case, was well aware that his own particular case had been adjourned from time to time to await the full outcome of CC . When that time came, the charge of rape was brought speedily following the entry of a *nolle prosequi* on the original charge. A reconsideration of this case was plainly necessary in the aftermath of the Supreme Court decision in the CC case. Section 1 of the Criminal Law (Amendment) Act, 1935 had been struck down as unconstitutional and in consequence implications also arose for prosecutions pending under s. 2 of the same Act. The infirmities in s. 1 were present also in s. 2 of the Act of 1935. It was thus both appropriate and, indeed, necessary for the respondent to review this case and in my view it was certainly open to him to substitute some other charge for that of attempted carnal knowledge under s. 2 of the Act of 1935. It is the choice of the charge of rape by way of substitution which creates the difficulty in this case. It seems clear from the affidavit of Mr. David Gormally, Senior Prosecution Officer in the office of the respondent, that a firm view had been taken within

the office that a rape charge against the applicant was not warranted. Given that no new or additional evidence at any time emerged from the time when the original charge of attempted carnal knowledge was brought, the adoption of the rape charge, which upon conviction provides for the possibility of a sentence of life imprisonment, represented an approach which was both inconsistent with the view taken earlier and a ramping up of major proportions in the scale of criminal behaviour alleged against the applicant. This is a case where the applicant had been given the option of having his case dealt with in the District Court had he decided to plead guilty. In such circumstances, his maximum sentence would have been twelve months, even assuming for this purpose that a custodial sentence would have been imposed. By electing to stand trial in the Circuit Court, the applicant still only faced the possibility of a maximum sentence of two years upon conviction on the charge originally preferred. The course now adopted by the respondent exposes the applicant to far greater risks and sanctions. Firstly, his trial will not be dealt with locally, but will be sent forward for trial to the Central Criminal Court. Secondly, a conviction might well result in a substantial custodial sentence. In *People (Director of Public Prosecutions)*

- v. Tiernan [1988] I. R. 250, at p.253, Finlay C. J. stressed that a custodial sentence should normally be imposed following conviction for rape. Even if the facts alleged in the present case do not suggest the offence is one in the most serious category, any conviction for rape creates a far greater possibility at least of a custodial sentence of some not inconsiderable length. Mr. Shane Murphy, Senior Counsel for the respondent, has argued that any unfairness thereby arising can be dealt with at the sentencing stage by the trial judge. He argues that any judge imposing sentence would have to take into account the background history of the case, including the fact that the case began as a case of attempted unlawful carnal knowledge in respect of which the maximum sentence in the Circuit Court would have been two years only. Fundamentally it is the magnitude of the quantum leap from the original charge to that now preferred which persuades me that the prosecution of the applicant on a charge of rape should be restrained on the basis that fair procedures require that any alternative charge brought should not be one which, notwithstanding the absence of new or additional evidence, is grossly different and disproportionate from the original charge. The substitution in the instant case was akin to the withdrawal of a Road Traffic Act prosecution for driving through a red light and the substitution instead of a charge of dangerous driving causing death. In current parlance, the “disconnect” between the original charge and the substituted charge is of such an order as to put the applicant in a far worse position than he was in under the original charge. I would emphasise that this is not a case where ongoing investigations have yielded up further information or evidence which justifies the laying of further charges in addition to a preliminary charge. That is quite a different situation and not one addressed by this judgment. Here a radically different prosecutorial decision was made in respect of precisely the same material which was once seen as appropriate only for a charge of attempted carnal knowledge. The applicant has lost his option of having his case dealt with in the District Court and faces the prospect of a trial

far from his home environment with a possibility of a far greater sentence upon conviction. This is palpably unfair given that the applicant has done nothing to contribute to this dramatic change of circumstances. An alternative charge which did not possess these features would obviously not have given rise to such consequences. In the course of the appeal the Court inquired if the respondent had considered availing of the Criminal Law (Sexual Offences) Act, 2006 to prosecute the applicant. Section 3 of that Act creates the new offence of defilement of a child under the age of 17 years and provides that, in the case of an attempt to engage in a sexual act with a child under 17 years, a person may be liable on conviction to imprisonment for a term not exceeding 2 years. The Act was introduced in response to the CC case and provides for a defence of honest mistake as to the age of the child but otherwise has many features in common with the original charge. Counsel for the respondent argued strongly that the Act of 2006 created a new offence and was not intended to have retrospective effect. Further, the Criminal Law (Sexual Offences) (Amendment) Act 2007 increased the penalty for attempt from 2 years to 5 years. While an interesting point was raised by this inquiry, I do not consider it necessary to resolve it in the instant case given that there are ample grounds as outlined above for concluding that the prosecution in its present form should be prohibited. I would allow the appeal and restrain the further prosecution of the applicant on the charge of rape. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/ie/cases/IESC/2008/S61.html>

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/ie/cases/IESC/2008/>

CASE PAGE <https://chat.esheria.ai/case-law/ireland/g-e-v-dpp-2008-iesc-61-30-october-2008>

Prepared on 25 October 2026 · Esheria