THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Edwards J.

226/14

The People at the Suit of the Director of Public Prosecutions
V
J. McD.

Appellant

Judgment of the Court of Appeal delivered on the 16th day of December 2014, by Birmingham J.

1. In this case J. McD. appeals a sentence of imprisonment imposed on him in the Central Criminal Court on the 7th October, 2014. The matter comes before this Court in somewhat unusual circumstances. The background to the present appeal is that the appellant is awaiting trial in the Central Criminal Court on a charge of rape. The trial date has been set for the 16th February, 2015. The date of the alleged offence was the 23rd December, 2010, at which stage the appellant was aged fifteen years, his date of birth being the 13th December, 1995.

2. The appellant was charged with the offence that he now faces on the 14th January, 2013, and was admitted to bail subject to a number of conditions, including compliance with the terms of a HSE Care Plan. On the 25th February, 2013, there was an application to the District Court to revoke bail because of alleged breaches of the HSE Care Plan. On this occasion a curfew was added to the bail conditions, which required the appellant to remain indoors at a specified location between 10.00 pm and 7.00 am. On the 11th March 2013, the appellant was sent forward for trial to the Central Criminal Court. On the 31st July, 2013, there was an application to revoke bail because of alleged breaches of the curfew. While this issue was under consideration, the appellant spent two weeks in custody, but on the 12th August, 2013 bail was reinstated on the original terms.

3. For completeness mention should be made of the fact that there was a further unsuccessful application to revoke bail in November 2013, but nothing turns on this. However, there was a further application for revocation which came before the court on the 7th October, 2014 and it is with the outcome of that application that this Court is now concerned. On that occasion, evidence was presented of persistent, and it must be said, flagrant breaches of the curfew on various occasions during July, August and September.

4. It should also be said that the appellant would contend that the curfew that he was subject to was onerous and impacted on his opportunity to pursue educational opportunities, to take up part time employment and to engage in various sporting activities. While a letter to this effect was written to the Garda Superintendent at Ballyshannon, there was no application ever brought by or on behalf of the appellant to lift or vary any of the bail conditions. That was so, notwithstanding that the recognisances entered into states in terms on its face that the accused may apply to the court at any time to have a condition of the recognisance varied or revoked.

5. The unchallenged evidence of Garda Elaine Healy, on the 7th October, 2014, puts beyond doubt that there were regular, persistent, indeed it might be said systematic breaches of the bail conditions. This cannot be lost sight of. Lest the references to suggested difficulties that the curfew was giving rise to, might mislead, it should be made clear that none of the breaches observed had anything to do with education or employment or sporting endeavours, but rather recorded him out and about on the streets of Bundoran in the early hours of the morning after nightclubs had closed.

6. At an early stage in the proceedings on the 7th October, 2014, the learned trial judge made a significant intervention. He interjected as follows:-

> "All right, I just want to put you on notice, having regard to the evidence I have heard so far, you are not just dealing with the revocation of bail, you are dealing with contempt in respect of which I have unlimited powers of fine and imprisonment."

To this counsel for the defence responded:

> "Absolutely, Judge."

7. On several occasions thereafter, counsel for the defence confirmed that he accepted this was a contempt issue, and said that he fully accepted the judge's view on that and did not dispute that this was a contempt. On one occasion, he went so far as to say, not just that he conceded that this was a contempt, but that he was asking the judge to treat it that way.

8. A major focus for the defence, throughout the hearing, was to establish that the curfew was unnecessary, because it was not needed to prevent interferences with witnesses or to reduce the risk of flight, it was accepted that Mr. McD was not a flight risk.

9. The question of what the response to a contempt could or should be was the subject of only one somewhat equivocal observation when counsel is quoted as saying:

> "I think it shows contempt for the Court. I think it is not acceptable behaviour, but I think the punishment should meet the crime. Now or is it not a crime and that is the particular issue."

10. The sentencing judge was particularly succinct in his ruling and it is convenient to set that out in full:

> "On the evidence which I have heard to day, I have not been satisfied as to the necessity for the curfew and I accede to the defence application to lift the curfew. The evidence, however, has thrown up the fact that the accused man in this case breached an undertaking which gave to me in this court on oath. That is one of the most serious forms of contempt of court and in respect of contempt of this Court, I have jurisdiction to impose unlimited fine or imprisonment. Direct defiance of an undertaking given in this Court on oath to me, so far as I am concerned, is at the higher level of contempt of court, and in respect of that, I impose a sentence of six months imprisonment to date from today."

11. Even from this brief overview of the course of the proceedings, it will be evident that there was no detailed analysis of whether the failure to observe the curfew, amounted to a contempt of court, and if a contempt of court whether the contempt in question

was a civil or criminal contempt and what procedures were required to be followed in the event.

12. We have been told by counsel for the defence that he had not realised that his client was at risk of imprisonment, until sentence was pronounced. Until that happened, he had been operating on the basis that the reference by the judge to contempt of court and his powers in that regard were simply designed to impress on a foolish and irresponsible young man, the seriousness of his situation.

13. It is a curious feature of this case, that even at this remove, and after the appellant had spent over two months in custody that the court has still not been furnished with detailed information about what precisely transpired in August 2013. In particular, despite the references by counsel for the prosecution to undertakings given to the judge, and the remarks of the judge in relation to breaches of undertaking it has not been made clear to this Court, in what terms and in what circumstances undertakings were forthcoming.

14. The court has had the benefit of written and oral submissions from both sides. The submissions on behalf of the appellant, it is accepted by counsel on his behalf, can be summarised as follows – the breaches of the curfew at most amounted to a civil contempt. Counsel does not accept that whether there was a breach of an undertaking offered or a breach of a bail condition that had been imposed makes a material difference. In that regard, the court notes that the schedule to the order of the Central Criminal Court of the 7th October, 2014, refers to the fact that Mr. McD is to be committed to prison for contempt of court in failing to comply with a condition of bail while awaiting trial. The power to imprison summarily applies only to criminal contempts in the face of the court and analogous situations, and this, it is submitted was not such a case.

15. This Court is now required to address the issue in a situation where there was no real analysis or debate in the Central Criminal Court as to the nature of the contempt that was under consideration, whether civil or criminal and no attempt was made to place this contempt on the scale of possible contempts.

16. The court's task is not made any easier by the fact that we have been provided with very limited information as to what transpired on the occasion when Mr. McD's liberty was restored to him and he was readmitted to bail. However, insofar as the focus on the 7th October, 2014, in part at least, was on a breach of an undertaking it seems that the court was dealing with a civil contempt, as distinct from a criminal contempt and certainly as distinct from a criminal contempt in the face of the court. In these circumstances ordinarily, the court's concern will be coercive, to bend the will, as it is put at chapter 6 of the Law Reform Commission paper on contempt of court. Ordinarily, it is to be expected that if a court becomes involved in the process of attachment and committal that this would have been at the instigation of one of the parties to the proceedings. However, very obviously that was not the situation here. A feature of the case is that it was accepted by the court that the curfew was not serving a useful purpose, or certainly not a necessary purpose, so there was no question of seeking to bend the will of Mr. McD. Again, unusually the court's intervention by way of a finding of contempt of court and imposition of punishment was of its own motion and not at the instigation of a party to the proceedings.

17. It is true that the courts have recognised the scope for what has sometimes been described as hybrid contempts, where courts in response to an application for attachment and committal on the civil side have decided that the behaviour of the respondent calls for the imposition of punishment over and above the coercive purpose of the application. (See the discussion on this topic by Fennelly J in County Council for the County *of Laois v Noel Hanrahan, Geraldine Hanrahan and Colm Hanrahan* [2014] IESC 34 and by Finnegan P in *Shell E & P Ltd v McGrath* [2007] 1 IR 671.)

18. However, the observations of Hardiman J. in *Dublin City Council v. McFeely* [2012] IESC 45 are very much in point at p. 24 he commented as follows:-

> "It is essential that the Courts should possess power to punish in a summary manner contempt of the Court or of the Courts' orders. If the Courts did not possess this power then a person who had lawfully obtained relief from a court might find himself or herself unable to enforce that relief.
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> But the exercise of this power must, in my opinion, always be a matter of last resort, embarked on with manifest caution and great reluctance. This is because the contempt of court procedures have the potential to deprive a citizen of his or her liberty, not to mention property, without their being accorded the elaborate but very necessary protections normally provided by the procedures of a criminal trial.
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> If a citizen could be summarily imprisoned, or fined a huge sum of money, without all proper meticulous attention being paid to the procedures which exist for his protection, then the liberties of citizens generally would be undermined. Everyone threatened with imprisonment for contempt, whether protestor, picketer or property developer is entitled in the public interest, to a meticulous observation of procedural justice, all the more so since the nature of the procedures involved deprive him of the right to trial by jury. It is important that the Court Order allegedly breached, should be indicated with absolute clarity and precision in the Motion for attachment and committal and that the evidence alleged to establish breach of that Order should be led in proper form *after* due and timely service of the Motion for attachment and committal. This Motion will normally be issued by a party and adjudicated upon, quite independently, by a judge."

In the same case Fennelly J. commented as follows:

> "The remedy of committal for contempt of court is an indispensable procedural remedy, whereby the courts can give effect to their orders, promote enforcement of orders in the interest of the parties and guarantee respect for the administration of justice and the rule of law. Without it, defiant and recalcitrant litigants might be able to defy the courts and the law and deprive opposing parties of their just rights. The ultimate remedy is committal to prison for contempt of court.
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> The other side of that coin is that the severity of the remedy of committal to prison for contempt of court necessarily requires due respect for the rights of the parties to be subjected to it. The simplest and most basic of all the requirements of justice is due and fair notice be afforded to the party charged. Lawyers call it *audi alteram partem.*"

19. In this case there is no doubt that the learned trial judge in very clear and specific terms adverted to the issue of contempt and it is unfortunate that counsel for the appellant did not appreciate the significance of what was being said to him.

20. In the present case, the fact that the procedure had been initiated by the judge, entirely of his own motion, meant that there was a particular need for meticulous observance of fair procedures. Insofar as the judge was dealing with breaches of undertakings given to him personally, it was important that there was no scope for the perception to develop, that he was prompted to deal in a

precipitate manner with the situation by a slight to his dignity as trial judge.

21. Unfortunately, the procedures followed seemed to have emphasised the desirability of expedition and firmness and resolution over consideration and deliberation.

22. There is a further point. Even taking the view of matters most favourable to allowing the order to stand, and assuming without deciding, in the absence of full argument, that the court might have been entitled to impose a prison sentence for breach of an undertaking in circumstances such as this, there remains for consideration the question of whether the imposition of a sentence received the kind of careful and anxious consideration that was required.

23. The breaches had been committed by a young person with no previous convictions and that would cause a court to consider carefully whether it was possible to avoid imposing a custodial sentence. The imposition of a prison sentence for contempt should not be considered lightly and before an immediate custodial sentence was imposed it would have been appropriate that consideration would have been given to whether a suspended sentence or a direction to undertake community service might have met the situation. If the court's view was that only a prison sentence met the situation, then the question was whether, given that the court was dealing with a very young first offender, a very short sentence, sometimes referred to as "a short sharp shock" would meet the situation.

24. In all the circumstances, this Court while understanding and sympathising with the frustration of the learned trial judge in the face of the persistent breaches of bail conditions and undertakings is nonetheless of the view that the sentence imposed is not one that can be allowed stand. The appellant has now been in custody for ten weeks which is the equivalent to a sentence somewhat in excess of three months imprisonment. In the circumstances the court will direct the release of the appellant and will reinstate the bail conditions that previously applied save for the curfew that was removed by the Central Criminal Court on the 7th October, 2014.