THE COURT OF APPEAL

Finlay Geoghegan J.
Irvine J.
Hogan J.

[185/2013]

THE PEOPLE (at the suit of the DIRECTOR OF PUBLIC PROSECUTIONS)

RESPONDENT

v.

JOHN SWEENEY

APPELLANT

JUDGMENT of the Court delivered on the 15th day of December 2014 by Mr. Justice Hogan

1. In what circumstances may a court impose an ancillary disqualification order under s. 27(1)(a) of the Road Traffic Act 1961 ("the 1961 Act") following a conviction in respect of an offence other than a road traffic offence where the effect of such an order is to disqualify the holder of a driving licence from driving a motor vehicle for a specific period of time? This, in essence, is the principal issue presented on this appeal.

2. The matter arises in the following way. The appellant, Mr. Sweeney, pleaded guilty to two counts of offences contrary to s.4 and s.18 of the Criminal Justice (Theft and Fraud Offences) Act 2001 ("the 2001 Act") respectively. The offences in question concerned the sale of a Ford Transit van using a false name to a Mr. Frank Butler for €4,200. The van in question was actually stolen from a laundry company in London. While this particular theft caused insurance difficulties for the owner of the vehicle (a Ms. Donna White), the van was ultimately returned to Ms. White and she was compensated through her own insurance company. The person who lost out as a result of this fraudulent act was the unfortunate Mr. Butler who had quite innocently paid out over €4,200 for a vehicle to which, as it ultimately transpired, he had no legitimate title.

3. In the Circuit Court Mr. Sweeney pleaded guilty to these two offences. The first offence was one of theft (contrary to s. 4 of the 2001 Act), namely, the act of depriving Mr. Butler of the sum of €4,200. The second offence was that of possession of stolen property, namely, the Ford Transit van (contrary to s.18 of the 2001 Act). For these offences Mr. Sweeney ultimately received a suspended sentence of two years imprisonment in respect of both offences on condition that Mr. Butler was recompensed in full. It is not in dispute but that full restitution has subsequently been made to Mr. Butler by the appellant. No appeal has been taken by the appellant in respect of these suspended sentences.

4. In addition, however, to the suspended sentence the learned trial judge disqualified Mr. Sweeney from driving for a four year period pursuant to s. 27(1)(a) of the 1961 Act. Mr Sweeney has appealed against that part of the sentence. The principal issue which arises in this appeal is whether the trial judge erred in law or in principle in imposing a disqualification order in respect of these offences to which the appellant pleaded guilty. We should also mention that one further issue also arose, namely, whether the accused should have been given advance notice that the trial judge was contemplating imposing a disqualification order. It is not, in the event, necessary to consider this issue.

5. Section 27(1)(a) of the 1961 Act provides

> "Where a person is convicted of an offence under this Act or otherwise in relation to a mechanically propelled vehicle or the driving of any such vehicle (other than the offence in relation to which s. 26 of this Act applies) or of a crime or offence in the commission of which a mechanically propelled vehicle was used, the Court may, without prejudice to the infliction of any other punishment authorised by law, make an order (in this Act referred to as an ancillary disqualification order) declaring the person convicted to be disqualified for holding a driving licence".

6. There are three broad categories of offences to which this sub-section applies. The first category is those offences which "relate" to a mechanically propelled vehicle. The second category involves certain driving offences and the final category concerns offences in the commission of which a mechanically propelled vehicle was used.

7. The first offence of which the appellant was convicted, namely, the theft of cash contrary to s. 4 of the 2001 Act, does not come within the scope of s. 27(1)(a) of the 1961 Act at all. The essential question, therefore, is whether the second offence is potentially captured by the words of this sub-section. If it does, it can only be because the offence in question (namely, possession of the stolen vehicle) falls either within the first category on the basis that it "relates" to a mechanically propelled vehicle or that it comes within the third category on the basis that the vehicle was used in the commission of a crime.

8. Perhaps the starting point for this inquiry is to examine the nature and purpose of the disqualification order itself. This issue has been settled since the Supreme Court's decision in *Conroy v. Attorney General* [1965] I.R. 411. In that case the plaintiff challenged the constitutionality of s. 49 of the 1961 Act insofar as it provided for the summary trial of the offence of drunk driving. In the High Court the plaintiff succeeded in establishing before Kenny J. that the offence was not minor in nature for the purposes of Article 38.2 of the Constitution, with the result that he held that s. 49 of the 1961 Act was unconstitutional insofar as it provided for the summary trial of what he considered to be a non-minor offence.

9. This conclusion was reversed on appeal by the Supreme Court. Delivering the judgment of the Court, Walsh J. reasoned that the mandatory disqualification order which attended a conviction for drunk driving could not be equated with the "primary punishment" (namely, a fine and a maximum of six months imprisonment) provided for by s. 49 of the 1961 Act. This meant in turn that the Court could only have regard to such primary punishment in assessing whether the s. 49 offence was in fact in the nature of a minor offence for the purposes of Article 38.2 of the Constitution. As Walsh J. explained ([1965] I.R. 411, 441):

> "That is the type of [primary] punishment which is regarded as punishment in the ordinary sense and, where crime is concerned, is either the loss of liberty or the intentional penal deprivation of property whether by means of fine or other direct deprivation of property. Any conviction may result in many other unpleasant and even punitive consequences for the convicted person. By the rules of his professional association or organisation or trade association or any other body of which he is a member he may become liable to expulsion or suspension by reason of his conviction on some particular offence…His very livelihood may depend on the absence of a conviction in his record. These unfortunate consequences are too remote in character to be taken into account in weighing the seriousness of an offence by the punishment it may attract."

10. The Court then went on to say in a critical passage ([1965] I.R. 411, 441-442) that the real nature of a disqualification is that it was "essentially a finding of unfitness of the person concerned" to hold a driving licence:

> "The disqualification from holding a driving licence…amounts to the withdrawal of a right granted by the Act in the manner prescribed by the Act. The fact that the Act grants the holder of a licence or the person entitled to a licence the benefits of a judicial hearing on the question of disqualification itself and the fact that the judicial hearing is conducted by the person who imposes the conviction which in some cases is a necessary condition precedent does not alter the nature of it at all. In so far as it may be classed as a punishment at all it is not a primary or direct punishment but rather an order which may, according to the circumstances of the particular individual concerned, assume, though remotely, a punitive character.
>
> One must not lose sight, however, of the real nature of the disqualification order which is that it is essentially a finding of unfitness of the person to hold a driving licence. Apart from the statutory minimum which is imposed in certain cases, this is a matter which must be determined by the Court in the light of evidence which it hears on this aspect of the case and in the light of that evidence it may determine what period of disqualification is appropriate. A motor car, if not driven properly, is a potential danger not merely to the driver himself, but to all other persons using the highway. It is obvious that the protection of the common good requires that the right to drive a motor car cannot be unrestricted. The right may therefore be lost if a court, on a consideration of the relevant facts materials, determines that the person concerned, by reason of his general recklessness or thoughtlessness or his propensity to drink or by reason of disease or other disability or his abuse of the right by exercising it in the furtherance of criminal activities is unfit to exercise the right to drive a motor car. Such disqualification is not a punishment notwithstanding that the consequence of such a finding of unfitness might be both socially and economically serious for the person concerned…. Undoubtedly disqualification may have a deterrent quality but that does not make it a punishment. It is a regulation of the exercise of a statutory right in the interest of public order and safety….Though it may have punitive consequences, disqualification cannot be regarded as punishment in the sense in which that term is used in considering the gravity of an offence by reference to the punishment it may attract upon conviction such as imprisonment or a fine, but rather is a finding of unfitness."

11. As it happens, the focus in Conroy was on s. 26 of the 1961 Act which provides for a mandatory disqualification order following a conviction for certain motoring offences, including drunk driving under s. 49 of the 1961 Act. It is clear, however, from the judgment of Walsh J. that the Court not only analysed the nature of the disqualification order under s. 27 in its judgment, but that it also treated the disqualification orders provided for in both s. 26 and s. 27 as effectively indistinguishable in this context, save that one (s. 26) was mandatory and the other (s. 27) was simply permissive.

12. While it is true that Conroy is ultimately a determination of the nature of a disqualification order in the context of the minor/non-minor offence distinction for the purposes of Article 38.2 of the Constitution, the reasoning of Walsh J. must nonetheless inform any wider analysis of the nature of such a disqualification order, whether it is imposed pursuant to either s. 26 or s. 27 of the 1961 Act. This is relevant so far as the present case is concerned, because the fundamental question governing the making of a disqualification order in relation to non-motoring offences is whether the offender has, in the words of Walsh J in Conroy, so abused his right to drive on a public road "by exercising it in the furtherance of criminal activities" that he is thereby "unfit to exercise the right to drive a motor car."

13. If the power to disqualify could be exercised in any wider fashion, then it would cease to retain the essential quality of a determination of fitness to drive. Such a broader interpretation would alter the general character of the disqualification power so that it would thereby evolve from a regulation of the fitness to drive into a form of primary punishment. This would have significant implications throughout the wider criminal justice system and would once again call into question the constitutionality of legislation providing for the summary disposition of drunk driving offences. As we have just pointed out, the constitutionality of s. 49 of the 1961 Act was upheld in Conroy on the basis that provisions of this nature were not in their nature primary punishments, even if they had unwelcome and inconvenient consequences for those affected by the making of such disqualification orders. It seems necessarily implicit in the reasoning of Walsh J. in Conroy that if such a disqualification order could be regarded as a primary punishment this would have led to a finding of unconstitutionality in that case inasmuch as s. 49 of the 1961 Act would thereby have sanctioned the summary trial of a non-minor offence, contrary to Article 38.2 and Article 38.5 of the Constitution. This point was also made in *The People (Attorney General) v. Poyning* [1972] I.R. 402, 411 where Walsh J. said that such "disqualifications are not primarily punishments and are not to be so regarded by trial judges."

14. It follows, therefore, that the apparent amplitude of the power to disqualify contained in s. 27(1)(a) of the 1961 Act must be read in the light of these considerations. In essence, therefore, it is incumbent upon us to give s. 27 an interpretation consistent with the Supreme Court's decision in Conroy and, by extension, with the Constitution itself. This means in turn that the disqualification power in s. 27 may be exercised in cases other than motoring offences only where there is evidence that there was either an offence relating to a motor vehicle or where a motor vehicle was used in the commission of a crime such that in either case the trial judge could properly conclude from the facts proved or admitted in relation to the commission of the offence that the accused is unfit to exercise his right to drive a motor car on a public highway

15. Can it therefore be said that this accused has abused his right to drive by exercising that right in the furtherance of criminal activities? In our view, there were no such facts proved or admitted in the present case. It is true that the fraudulent conduct concerned a motor vehicle which the appellant knew to be stolen. It is, however, insufficient for this purpose that the criminal conduct simply involved a motor vehicle. It is necessary instead that the facts go further and that these demonstrate that the accused abused his right to drive by exercising this right in furtherance of criminal activities and that this was an integral feature of the offence attracting the making of the disqualification order under s. 27 of the 1961 Act.

16. While it may well be that this offender drove the stolen van on a public highway, the essence of the second offence to which the appellant pleaded guilty, namely, possession of a stolen vehicle involved a deception of the purchaser as to who the rightful owner of the vehicle actually was. It cannot be said that, in this instance at least, the act of driving the vehicle on the public road was an essential component of this unlawful act of deception. It follows, therefore, that there was no evidence upon which the learned trial judge could properly have concluded that the appellant in this case abused his right to drive by exercising that right in furtherance of his criminal activities such as would trigger the potential application of a disqualification order under s. 27(1)(a) of the 1961 Act.

Conclusions

17. It follows, therefore, for the reasons just stated, that in these circumstances the learned trial judge erred in principle in making the disqualification order. The Court will accordingly allow the appellant's appeal and will set aside the making of the disqualification order.