Neutral Citation Number: [2010] IEHC 482

**THE HIGH COURT**

**2009 1072 JR**

**BETWEEN**

**ANTHONY SHARLOTT**

**APPLICANT**

**and**

**JUDGE COLLINS AND THE JUDGES OF DUBLIN CIRCUIT CRIMINAL COURT**

**RESPONDENTS**

**and**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**NOTICE PARTY**

**JUDGMENT OF MR. JUSTICE HANNA delivered on the 21st day of December, 2010**

1. By order of Peart J., dated the 19th October, 2009, the applicant herein was granted leave to bring these judicial review proceedings seeking the following reliefs: (1) An order of *certiorari* to quash the order of the first named respondent, dated the 4th June, 2009, remanding the applicant to appear before the second named respondents, pursuant to s. 99(9) of the Criminal Justice Act 2006, as amended by s. 60 of the Criminal Justice Act 2007 and s. 51 of the Criminal Justice (Miscellaneous Provisions) Act 2009; and (2) an order of prohibition restraining the second named respondents from hearing the application to revoke the suspended sentence pursuant to s. 99 of the Criminal Justice Act 2006, as amended.

2. The background facts are as follows. The applicant was charged with an offence contrary to s. 11 of the Firearms and Offensive Weapons Act 1990, as amended by s. 64 of the Criminal Justice Act 2006, involving the alleged production of an article capable of causing serious injury. The penalty for this offence, on summary conviction, is a fine not exceeding €5000, or a maximum of 12 months' imprisonment, or both.

3. The applicant's case was heard by the first named respondent on the 27th May, 2009, and he was convicted.

4. It appears that the applicant had previously been sentenced to imprisonment for a period of five years by His Honour Judge McDonagh on the 2nd March, 2007, on a charge of attempted robbery. This sentence had been suspended in its entirety.

5. Section 99 subsections (9), (10), and (10A) of the Criminal Justice Act 2006, ("the Act") as amended, provide as follows:-

> "[9] Where a person to whom an order under subsection (1) applies is, during the period of suspension of the sentence concerned, convicted of an offence, being an offence committed after the making of the order under subsection (1), the court before which proceedings for the offence are brought shall, before imposing sentence for that offence, remand the person in custody or on bail to the next sitting of the court that made the said order. [10] A court to which a person has been remanded under subsection (9) shall revoke the order under subsection (1) unless it considers that the revocation of that order would be unjust in all the circumstances of the case, and where the court revokes that order, the person shall be required to serve the entire of the sentence of imprisonment originally imposed by the court, or such part of the sentence as the court considers just having regard to all of the circumstances of the case, less any period of that sentence already served in prison and any period spent in custody other than a period spent in custody by the person in respect of an offence referred to in subsection (9) pending the revocation of the said order. [10A] The court referred to in subsection (10) shall remand the person concerned in custody or on bail to the next sitting of the court referred to in subsection (9) for the purpose of that court imposing sentence on that person for the offence referred to in that subsection."

6. Thus the applicant faces the possibility of the reactivation of his earlier suspended sentence. On behalf of the notice party, Ms. Halpin, solicitor, drew the learned trial judge's attention to the prior sentence. There is some dispute between the applicant's solicitor, Mr. Bermingham, and Ms. Halpin as to the application then made by Ms. Halpin. At paragraphs (6) and (8) of his affidavit, the applicant's solicitor deposes:-

> "Ms. Halpin indicated to the court that the applicant was the subject matter of the suspended sentence imposed by Judge McDonagh in the Circuit Court. Having sought time from the court to take instructions on the matter, Ms. Halpin indicated that she did not have an application that the applicant be remanded back to the Circuit Court under section 99(9) of the Criminal Justice Act 2006 (as amended by section 60 of the Criminal Justice Act 2007). …
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> The following week on the 4th June, 2009, the applicant presented in the District Court in order to file his notice of appeal de novo to the Circuit Criminal Court and to enter the appeal recognisance. The application was made ex parte as required. The applicant was represented by Kieran Conway of my office. Ms. Halpin appeared in court and requested that, notwithstanding her earlier indication, she wished the applicant to be remanded to appear before the second named respondents pursuant to section 99(9)."

7. However, at paragraph (6) of her affidavit, Ms. Halpin avers:-

> "I beg to refer to paragraphs (6) and (8) of the said affidavit sworn herein by John Bermingham. I say that, contrary to what is averred therein, I had consistently argued from immediately after the applicant's conviction that the applicant should be remanded to the Circuit Court under s. 99 of the Criminal Justice Act 2007 (as amended). I never suggested that the applicant should be so remanded. The reason why I did not press the matter further at the first hearing was that the first respondent decided to fix recognisance in any event."

8. As to the dispute between Mr. Bermingham and Ms. Halpin, no cross-examination was sought by either side. I am quite sure that both solicitors are being entirely truthful as to their recollection of events. Since I cannot determine whose recollection to accept in the absence of cross-examination I must perforce find against the party upon whom the onus of proof rests, the applicant. Therefore,

I approach this case on the basis that at the material time an application to remand to the Circuit Court was made. I should however observe that even if it was not, would it matter? I will deal with this later.

9. The first respondent fixed recognisance but did not impose sentence. One week later, on the 4th June, 2009, the applicant again appeared before the first respondent to file his notice of appeal and enter recognisance. On the application of Ms. Halpin, the applicant was remanded on bail to appear before the second named respondent on the 29th June, 2009.

10. On the latter date, the matter came before Her Honour Judge Delahunt. It seems the notice party asked that the matter be adjourned. The applicant argued that the matter ought not to be heard and the appeal against the first respondent's decision was still outstanding and the order remanding was bad.

11. It is not contested that Her Honour Judge Delahunt adjourned the matter to the 22nd October and indicated, as I already referred to, that the application would "go ahead on the next occasion."

12. The applicant raised two issues: firstly, whether the first named respondent had jurisdiction to remand the matter to the Circuit Court. The applicant claimed that on the 4th June the District Court was *functus officio*. Alternatively, the applicant contended that if the order was to be correct it would have been made subject to a stay pending the outcome of the Circuit appeal. Secondly, whether the applicant's undoubted right to fair procedures mandated this court to stay the procedure in the Circuit Court under s. 99 of the Act until after the District Court appeal has been finalised.

13. Counsel for the notice party argued that the learned District Judge was entitled to act and was within jurisdiction to do as she did. Indeed, she was compelled by law to remand the applicant to the Circuit Court. Further, there was a *quia timet* element to this case. One must assume that a Circuit Court judge will take all the necessary and reasonable steps to ensure that the applicant will not be deprived of his constitutional right to liberty and to due course of law.

**Decision**

14. The terms of s. 99(9) of the Act of 2006, in my view, are mandatory on the learned District Judge. With or without any application, she was bound to remand the applicant to the next sitting of Dublin Circuit Criminal Court. The learned District Judge has convicted but not yet sentenced the applicant. The question of her being *functus officio* in the circumstances, does not arise.

15. The decision of the Supreme Court in *State (Aherne) v. Cotter* [1982] I.R. 188 ('*Aherne*'), and more recently the decision of McCarthy J. in *Muntean v. District Judge Hamill and D.P.P.* [2010] I.E.H.C. 391, (Unreported, High Court, McCarthy J., 6th May, 2010) ('*Muntean*'), hold that appeals from the District Court to the Circuit Court in criminal matters cannot be brought against conviction alone. I appreciate that a different view was offered by Charleton J. in *Burke v. D.P.P. and McNulty* [2007] 2 I.L.R.M. 371. However, it appears that *Aherne* was not opened to Charleton J. in written or legal submission.

16. In *Muntean*, McCarthy J. analyses *Aherne* thus at paras. 15-18:-

> "There, and relying upon the form of a notice of appeal prescribed by the Rules of the District Court, the prosecutor purported to appeal against conviction only. On the hearing of the appeal the learned Circuit Court Judge increased the sentence of imprisonment imposed in the District Court. Whilst the 1928 Act was not amended thereby, the Supreme Court found it necessary, in dealing with the statutory jurisdiction to appeal, to consider s. 50 of the Courts (Supplemental) Provisions Act 1961 which as quoted by Walsh J. at p. 195, and provides that:-
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> > '…when an appeal is taken against an order in a criminal case made by a Justice of a District Court convicting a person and sentencing him to undergo a term of imprisonment and either
> >
> > (i) the notice of appeal states that the appeal is against so much only of the order as relates to the sentence or
> >
> > (ii) the appellant, on the hearing of the appeal, indicates that he desires to appeal against so much only of the order as relates to the sentence, then, notwithstanding any rule of law, the Circuit Court shall not, on the hearing of the appeal, re-hear the case except to such extent as shall be necessary to enable the court to adjudicate on the question of sentence.'
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> He also said at pp. 195-196 that:-
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> > 'At first sight that would appear to indicate that the "rule of law" in existence at the time when that Act was passed was to the effect that an appeal from a District Court conviction in a summary matter was, by its nature, an appeal against both conviction and sentence and that it was not possible to limit the appeal to one or other of these results.'
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> Walsh J. pointed out that in *Ex-parte M'Fadden* (Judgments of the Superior Courts in Ireland 1903, ed. p. 168) Palles C.B., held that on appeal to Quarter Sessions (being an appeal analogous to an appeal to the Circuit Court) there was no limitation on the powers of that court, the appeal being a new trial in every sense of the word, that is to say:-
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> > '… [by virtue of the relevant statutory provision]… in the result both conviction and sentence were open to review depending on the outcome of the retrial.'
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> And, accordingly Walsh J. said at pp. 196-197 that this was:-
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> > '… the view of the Oireachtas when it passed the Courts (Supplemental Provisions) Act, 1961, and made special provision for the possibility of appealing against sentence as distinct from conviction. It did not make any such provision for an appeal against conviction solely. Section 18 of the Act of 1928 extended the right of appeal to all cases where any fine or any imprisonment was imposed, but it made no provision for appealing against conviction alone or penalty alone.'
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> Later, also at p. 197 (in addressing the Rules of the District Court) he said:-
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> > 'The right of appeal is determined by statute and, if the statute does not permit an appeal against conviction

separately, the … Rules of the District Court cannot purport to do otherwise.'

Whilst the judgment of Henchy J. dealt primarily with the procedural aspects of the application before the Supreme Court, he said, at p. 206, in relation to separate appeals pertaining to conviction and sentence:-

'… I could not subscribe to the conclusion that an appellant from an order made by the District Court in a criminal case may confine his appeal to the Circuit Court to the question of guilt, to the exclusion of the question of sentence.'

And, later-

'… if the correlative right to confine an appeal to the question of conviction was intended to operate, s. 50 of the Act of 1961 would not have remained silent on the point. At the very least, it would not have given an appellant the right to limit his appeal to the question of sentence subject to the express proviso that such limitation was to be "notwithstanding any rule of law". In other words, s. 50 of the Act of 1961 is to be read as encompassing no more than a special exception to the general rule that an appeal from the District Court to the Circuit Court is to be a re-hearing *de novo* on which all issues, of law and fact are open.'

Thus, one cannot limit one's appeal, (subject to the provisions of s. 50 of the 1961 Act), to an appeal against conviction only."

17. Hedigan J. in *Harvey v. District Judge Leonard and D.P.P.* [2008] I.E.H.C. 209 (Unreported, High Court, Hedigan J., 3rd July, 2008), although appearing to follow Charleton J., nevertheless has the following helpful paragraph:-

"The challenge is based on what I consider the mistaken view that conviction and sentence are so inextricably linked that nothing of substance can occur between them. That proposition cannot be correct. Experience over many years shows practitioners that District Judges regularly convict and put back for sentence. There may be sought probation or other reports or all manner of further evidence before sentence is imposed. The procedure contemplated by s. 99 is obviously different but nonetheless clearly occurring within the same hiatus between conviction and sentence. The reality in all such cases is that the accused has been convicted and awaits sentence. The wording of the Act could not be clearer and its meaning is also clear. The requirement on the District Judge is mandatory and the District Judge's actions were exactly in accordance therewith. In regard to the Probation Act any loss the applicant might suffer is provided by law.

It also seems to me that the first named respondent has jurisdiction to prescribe the procedure in relation to remanding the matter before the other Court pursuant to s. 99(9) of the Act as amended, notwithstanding the absence of rules of Court and Court forms specifically governing the procedure. The lack of such forms and rules, it seems to me, cannot interfere with the duty of the first named respondent to comply with s. 99(9) but rather leaves the Judge with the discretion as to how the duty is to be performed. For all the above reasons I refuse the reliefs sought in these proceedings."

18. In my opinion the District Court is still seised of this case. A District Court trial is still in being awaiting the sentencing phase. The applicant maintains his innocence. He seeks to appeal. Since he cannot appeal against conviction alone, the sentence phase will have to be concluded before he may proceed with his appeal.

19. No doubt the learned District Judge was presented with a somewhat awkward situation. She was told by the prosecution she must remand to the Circuit Court. She was asked by the defendant to fix recognisances. However, the matter now rests in one sense with the Circuit Court. The applicant is apprehensive that the suspended sentence may be activated before he has the opportunity to pursue his appeal. Were he ultimately to succeed and to stand innocent of the District Court charge, he would undoubtedly suffer a grave injustice were the Circuit Court sentence in the meantime activated.

20. The *quia timet* nature of this application is something which counsel for the notice party complains, and in my view rightly so. Without taking an overly prescriptive view, it seems to me that matters which have arisen, although not provided for in statute, can be resolved with the Circuit Court, and District Court where one can only and does presume that all and any necessary steps will be taken to uphold and vindicate the applicant's rights to fair procedures, liberty and due course of law. (See *Blanchfield v. Hartnett* [2002] 3 I.R. 207 and of the decision of Gannon J. in *Clune v. D.P.P.* [1981] I.L.R.M. 17). It is eminently within the discretion of the Circuit Court to enable the applicant to pursue his appeal from the District Court. I am not at all persuaded that the remarks of the learned Circuit Judge indicate anything other than a determination to make a decision in the matter. I refuse the application.