Neutral Citation: [2016] IEHC 258

**THE HIGH COURT**

**Record No. 2015/26/JR**

**BETWEEN**

**MERVIN WHITE**

**APPLICANT**

**AND**

**DISTRICT JUDGE ANNE WATKIN**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENTS**

**JUDGMENT delivered by Mr Justice Max Barrett on 26thMay, 2016.**

## Part 1

## Overview

1. Time and tide wait for no man. Ultimately, neither do the courts. Mr White, a veteran of the criminal justice system, pleaded guilty to a number of road traffic offences on 1st October, 2014. His sentencing was scheduled for 22nd October but he failed to appear. His sentencing was then re-scheduled for 12th November but he failed to appear. His sentencing was then re-scheduled for 10th December and his lawyer was told to advise Mr White that if he failed to appear, sentencing would proceed in his absence. The 10thof December came and Mr White again failed to appear. The learned District Judge gave him a good part of the day to see if he would turn up and then eventually proceeded to sentence Mr White in his absence. Mr White comes now to court seeking, amongst other matters, that his sentence be quashed on the basis that in proceeding to sentence him so, the learned District Judge erred in law. Regrettably for Mr White,his application must fail.

## Part 2

## Facts

2. On 1st October, 2014 Mr White pleaded guilty to drunk driving, dangerous driving, driving without insurance, and driving without a licence. This comes on top of a previous 35 convictions and has the result that Mr White has now amassed more convictions than he has years. Following his guilty plea, which came on the heel of a number of non-appearances and several bench warrants, Mr White's sentencing was adjourned to 29th October, 2014. The court was told on that date that Mr White's partner was having a baby and that in consequence he could not attend. The learned District Judge accepted this excuse and adjourned matters to the following 12th November. On that later date, the learned District Judge was told that Mr White was unable to attend because his sister was seriously ill. The learned District Judge accepted this excuse and again adjourned matters, this time to 10th December. However, she told Mr White's legal representative to advise Mr White that if he did not appear on the December date, sentencing would proceed in his absence.

3. On 10th December, Mr White's counsel rose in court to advise the learned District Judge that Mr White had missed the early bus from Limerick and would not be coming to court. Based on her previous dealings with Mr White, the learned District Judge let the matter stand until the early afternoon. At that time, with nary a sight of Mr White, the learned District Judge proceeded to sentence. She heard Garda evidence about Mr White's previous convictions. She took account of the fact that Mr White had two previous convictions for driving without insurance and one previous conviction for drunk driving and imposed a prison sentence of two months. Mr White contends that in proceeding as she did, the learned District Judge erred in law. A recovering drug addict, Mr White's particular grievance is that if the learned District Judge had but waited to hear from him in person, he would have apprised her of his good progress in terms of recovery as well as his generally managing to keep out of trouble, all of which might have led to his being considered a candidate for community service.

## Part 3

## Reliefs Sought and Grounds Alleged

4. The various reliefs sought by Mr White at the leave stage have since been whittled down by his counsel to the following three key reliefs:

> (1) an order of *certiorari* quashing the orders made by the learned District Judge in respect of Mr White on 10th December, 2014;
>
> (2) an order of prohibition and/or in the alternative an injunction restraining the learned District Judge and the DPP from proceeding to take any further steps in relation to the charges contained in the summonses that formed the basis of the proceedings before the learned District Judge; and

(3) a declaration that the learned District Judge should not have sentenced Mr White in his absence to a term of imprisonment of two months and by so doing acted in excess of and/or without jurisdiction and contrary to the principles of fair procedures and natural and constitutional justice.

5. It is alleged by Mr White that:

(I) the learned District Judge erred in law and acted in excess of and/or without jurisdiction and contrary to the principles of fair procedures and natural and constitutional justice in (i) proceeding to sentence Mr White to a significant term of imprisonment in his absence without good or sufficient reason; (ii) disregarding counsel's submissions that she (counsel) could not offer mitigation in Mr White's absence and that a bench warrant for sentence should issue; (iii) determining and imposing a significant custodial sentence without knowing Mr White's personal circumstances and other mitigating factors; (iv) undermining Mr White's constitutional right to be tried in due course of law; and (v) denying the applicant his rights pursuant, inter alia, to the European Convention on Human Rights.

(II) the learned District Judge acted in excess of and/or without jurisdiction in refusing to issue a bench warrant for the arrest of Mr White once a custodial sentence came within her contemplation, when this (allegedly) was the only mechanism that would ensure that justice was done.

(III) the learned District Judge erred in law and acted in excess of and/or without jurisdiction by denying Mr White an opportunity to put forward mitigation in breach of the principle of *audi alterem partem.*

6. The court notes in passing that it accepts the contention of counsel for Mr White that in the context of a household that may be largely dependent on such income or unemployment benefit as a convicted person may be 'bringing in', even a two month sentence of imprisonment is significant. Indeed the court's impression from some of the applications that it hears is that prison is sufficiently unpleasant an environment that any but perhaps the very briefest sentence of imprisonment would have the potential to be considered significant.

**Part 4**

**Some Applicable Case-Law**

**A. Overview.**

7. As ever, counsel have laboured hard in the field and gathered a rich harvest of judgments that identify the law relevant to this application. Perhaps four cases suffice to decide the matters at hand, viz. *Brennan v. Windle and Others* [2003] IESC 48, *Callaghan v. Governor of Cloverhill Prison* [2007] IEHC 294, *O'Brien v. Coughlan* [2011] IEHC 330 and the decision of the Supreme Court on appeal in *O'Brien v. Coughlan* [2013] IESC 4. The court turns briefly to consider each of these cases.

**B. Brennan v. Windle and Others.**

8. The facts of Brennan are rather curious. Summonses alleging certain road traffic offences were not served on Mr Brennan or on any person who told him about them; it may be that they were served on his aunt but she appears to have never mentioned them to him. In consequence, Mr Brennan was not aware of the date set for the hearing of his case, not unsurprisingly did not turn up, and was tried and sentenced in his absence. On appeal from a refusal in the High Court to quash the conviction and sentence, a three-judge Supreme Court allowed the appeal.

9. In the Supreme Court, three grounds of appeal were relied upon. The two most relevant for the purposes of this judgment were that the District Judge in that case (i) erred in law and acted in excess of jurisdiction in the circumstances in not affording Mr Brennan due process and/or fair procedures or natural/constitutional justice; and (ii) erred in the exercise of his discretion in not deeming it appropriate to issue a bench warrant for the arrest of Mr Brennan, a course which would have enforced the attendance of Mr Brennan before the District Court.

10. Two judgments were delivered in the Supreme Court. The one that has tended to attract greater later attention is that of Geoghegan J. who observes, *inter alia,* at 509 et seq:

> *"I move, therefore, to the second ground for seeking to quash the conviction and sentence. This is essentially a natural justice ground. What is argued on behalf of [Mr Brennan]…is that [the learned District Judge]…should not have proceeded to hear the case and impose a conviction and, above all, a sentence of imprisonment without taking reasonable steps to ensure that the applicant was notified of the case given that there was no appearance….The applicant , in my view, has made out a prima facie case to establish that the case should either have been adjourned or that [the learned District Judge]…should have satisfied himself that the applicant did in fact know about the case….Once the [learned District Judge]…would have had in mind to impose a prison sentence and particularly a sentence as long as four months and, particularly in all the circumstances, that the offence in question would not invariably attract a prison sentence, the [learned District Judge]…failed in my opinion to afford the applicant due process and/or fair procedures or natural/constitutional justice….*
>
> *Given that [Mr Brennan]…is entitled to have the conviction and sentence quashed on the basis of the second ground permitted, it is not strictly necessary to consider the third ground. I would, however, agree with the High Court judge that there would not necessarily be any obligation on a District Court judge to issue a bench warrant merely because there was no appearance."*

**C. Callaghan v. Governor of Cloverhill Prison.**

11. This was an Article 40 application in which Mr Callaghan initially failed to attend at the District Court to face certain motoring charges following the service of summonses by 'letter box service', it seems literally the posting the summonses through the letter-box at a particular address. The learned District Judge in that case adjourned matters until a Garda had personally cautioned Mr Callaghan as to the new remand date. A member of An Garda Síochána subsequently called to a particular address and, after the door was answered by a man, spoke to Mr Callaghan's mother. At some point, Mr Callaghan walked by and stood behind the front door listening to what was being said to his mother – and thus directly learned of the new remand date. In the High Court, Peart J. saw this as a critical distinction between the case before him and that before the Supreme Court in Brennan, so much so as to render the decision in Brennan inapplicable to the facts before him. Per Peart J:

*"I am satisfied that since the applicant was clearly present behind the door, and the Garda was satisfied at the time that it was the applicant, that the applicant was notified in person. It was the applicant who chose to remain behind the door rather than face the Garda as he was speaking. That does not mean that he did not hear what was being said. I believe that the applicant heard exactly what was said and was fully aware of the adjourned date from what was said.*

*Since I am satisfied in this regard as a fact, the relevance of Brennan…disappears. The ratio of that decision was based on the accepted fact that the applicant was sentenced to a term of imprisonment as a result of proceedings of which he had no notice.*

*In the present case I am completely satisfied that the District Judge did everything which was reasonably required of him in order to ensure that the applicant's rights to due process, fair procedures, natural and constitutional justice were afforded to him."*

12. Turning to this last aspect of matters, Peart J. later goes on to observe as follows:

*"It is important in my view to recall that the rights to due process, fair procedures, natural and constitutional justice are rights possessed of [Mr Callaghan]….They are his rights which he is entitled to assert. It is implicit that if he has these rights, which is the case, he is entitled to be afforded a reasonable opportunity to avail of them and a reasonable opportunity to have the benefit of them. The duty of the District Judge is not to ensure that the applicant is conveyed to Court by means of a bench warrant, possibly against his will, in order to make certain that the applicant avails of his rights. It must be the case that the applicant has the right to forego his rights if he freely chooses to do so. A bench warrant is a mechanism for bringing a person to Court who is in breach of his obligation to be in Court. In the present case [Mr Callaghan]…on these summonses was not obliged to be in Court, but he was entitled to be provided with a reasonable opportunity of being present when the case was being dealt with should he wish to do so."*

**D. O'Brien v. Coughlan (High Court).**

13. This case featured an application for judicial review in which Mr O'Brien sought an order of *certiorari* quashing a conviction and penalty imposed on him in absentia by the trial judge. The basis for seeking the order was that, by failing either to adjourn the case or to issue a bench warrant to compel the presence of Mr O'Brien, the District Judge deprived Mr O'Brien of his right to fair procedures under both natural and constitutional law, and in so doing, acted in excess of jurisdiction. In the closing section of his judgment, under the heading "*Decision*", Kearns P. observed as follows:

*"It is [a] regrettable aspect of the administration of justice in modern times that both prosecuting authorities and the courts are expected…at every juncture to facilitate defendants who themselves neglect or decline to co-operate in the procedural requirements which require to be observed by both prosecution and defence so as to permit the criminal justice system to function effectively. It is thus by no means uncommon to hear that members of An Garda Síochána are required to devote a great deal of time and energy to the execution of bench warrants where persons remanded on bail fail to turn up for designated sittings or simply ignore the process altogether. It is often later argued or contended that it was an injustice for the court to proceed further in the absence of the person accused or charged with a particular offence.*

*The applicant in this case was present in court on the date when his trial date was fixed. I therefore reject the purported explanation offered now in the context of the present application to explain non-attendance.*

*I think in the circumstances the District Judge was entitled to proceed with the trial and reach a conclusion as to guilt or innocence.*

*However, I am satisfied a different consideration must arise where the District Judge then intends to impose a custodial sentence which is something more than a short term custodial sentence. A sentence of five months' imprisonment must be considered as a sentence of substance. That being so, this Court is constrained to follow the decision of the Supreme Court in Brennan…which stated firmly that where the sentencing judge has in mind to impose a prison sentence of some length in circumstances where the offence in question would not invariably attract a prison sentence, the failure…at least to ascertain if there is a bona fide reason for non-attendance or to make some effort to secure the attendance of the applicant and hear him before proceeding to impose the sentence does amount to a breach of fair procedures and a breach of the requirements of constitutional justice.*

*While a brief custodial sentence may not give rise to such a requirement, I believe such a requirement does arise in this case because of the significant sentence the District Judge had in mind to impose. Accordingly, I would uphold the applicant's submission in that, having found the applicant guilty, the respondent should, prior to the imposition of sentence, have either adjourned the case or issued a bench warrant to compel the presence of the applicant before imposing sentence."*

**E. O'Brien v. Coughlan(Supreme Court)**

14. The decision of Kearns P. in *O'Brien* was appealed by the DPP to the Supreme Court. Dismissing the appeal, the Supreme Court found that the District Judge in that case had not been incorrect to refuse the adjournment request. Like Kearns P. in the High Court, the Supreme Court was satisfied that the handing down of a term of imprisonment in the defendant's absence was, in the circumstances, unfair. As with the judgment of Kearns P., the judgment of Charleton J. for the Supreme Court repays careful reading. Per Charleton J., at paras 6 et seq:

*"6…[I]n order to exercise any of the rights guaranteed by Article 38.1 of the Constitution, which prohibits any criminal trial taking place 'save in due course of law', a person accused of a crime must know when and where they are to be tried….[W]hile there is a right of the accused to attend at his or her own criminal trial and to participate in it, that entitlement can be lost through persistent misconduct and can also be waived through a decision not to turn up. In reality, this means that the prosecuting authorities should do what is practicable to inform an accused as to when he or she should appear in court. Once there, further dates as announced are the responsibility of the accused….*

*7….Where it is a question of a sentence hearing, where much less in the way of evidence is required [than at trial], the*

*matter may be balanced more in favour of a process of compulsion to require the attendance of an offender before proceeding to impose an appropriate punishment on conviction….*

*10. Sentencing has always been regarded as a separate hearing from the criminal trial process, where same leads to a conviction. On sentencing, separate evidence may be led by the prosecution, including perhaps a victim impact report. An outline of the accused's [now convicted person's] character and any prior convictions will be given and the accused has an entitlement to gather testimonials from responsible people in the community and to offer evidence and submissions in mitigation….For the accused, the sentence hearing is the final opportunity to marshal evidence in the hope of mitigating the consequences to him or her of being convicted.*

*11. In the consequence of separate evidence, of potentially final consequences as to penalty, and of the relative concision and convenience of a sentence hearing, it is not surprising that this Court in Brennan…considered that where an accused is convicted, but was not present at his trial, consideration of sentence should be adjourned where the judge is of the view that a prison sentence may be appropriate, in circumstances where this may not be invariably predicted from conviction for the offence."*

**Part 5**

**A Distillation of Fact**

15. It is useful to distil the facts of each of the cases referred to above:

(1) *Brennan* is a case where (a) the applicant did not know of the charges against him and (b) was subjected to what was in effect a unitary process of trial and sentencing done *in absentia.*

(2) *Callaghan* is a case where (a) the applicant knew of the charges and trial date and (b) was subjected to what was in effect a unitary process of trial and sentencing in absentia.

(3) *O'Brien* is a case where (a) the applicant knew of the charges and trial date and (b) was subjected to what was in effect a unitary process of trial and sentencing done in absentia.

16. The present case is a case in which (a) the applicant had pleaded guilty in person, (b) knew each time the date on which he was due to be sentenced, (c) failed on each occasion to turn up for sentencing, on the last occasion for a reason that is almost whimsical, (d) was previously advised that if he did not turn up on the last occasion (the December hearing) he would be sentenced in absentia, and (e) having (i) been afforded every opportunity to turn up and/or to instruct his legal advisors as to what mitigating factors he wanted laid before the court, and (ii) been given still further time on the day of the December sitting to present himself, nonetheless failed to come to court. In short, the facts of the case now before the court are radically different from the facts of *Brennan, Callaghan and O'Brien*, so much so that the court might not unreasonably conclude that those cases are of no relevance to that now before it. But is there anything in the principles identified in those cases that can be applied by analogy here?

**Part 6**

**A Consideration of Principle**

17. In *Callaghan*, Peart J. sought to distinguish *Brennan* on the basis that in Brennan the applicant did not know of the charges against him and in *Callaghan* he did. But given that the Supreme Court in O'Brien saw itself as acting consistently with its own previous decision in *Brennan*, the Supreme Court clearly sees the dictum of Geoghegan J. in *Brennan* to be an overarching dictum that applies regardless of which of the factual matrices identified in the previous section of this judgment pertains. In other words, Geoghegan J.'s dictum applies whenever a person is subjected to what is in effect a unitary process of trial and sentencing done in absentia. And what *Brennan*, as applied by the Supreme Court in O'Brien, requires is that where an accused is convicted *in absentia,* consideration of sentence should then be adjourned where (I) the judge is of the view that a prison sentence is appropriate and (II) that fact may not invariably be predicted from the mere fact of conviction.

18. In the present case,(i) there has patently been a gap between the date on which Mr White pleaded guilty, (ii) he was on notice of each of the three dates that followed on which sentencing was due to occur, (iii) he was expressly advised that in December he would be sentenced *in absentia* if he did not turn up, when he called his legal team on the morning of the December sitting to advise that he had missed his bus (and took the perplexing decision not to take any later bus) he could have told them what mitigating factors he wanted raised at his sentencing hearing but appears not to have done so, and (iv) it was only after all this that the judge proceeded to sentencing. There is nothing in that sequence which is less than entirely consistent with the decisions of the Supreme Court in *Brennan and O'Brien.*

**Part 7**

**Should a Bench Warrant Have Issued?**

19. Where does all of the foregoing leave Mr White? He contends that because the fact that a sentence of imprisonment would not invariably follow his having pleaded guilty to the offences of which he was charged, it was incumbent on the District Judge to issue a bench warrant so that he could be forcibly brought to court in order that he might raise such mitigating factors as he had hoped to mention when he failed to turn up on each of the three sentencing dates, on the last day because he missed his bus, even though there were later buses that would have brought him, later in the morning of the District Court's sitting, to a bus station within five minutes' walk of the criminal courts.

20. There is no legal basis in any of the above-mentioned cases for Mr White's contention. Indeed, although *Callaghan* may dwell in something of a legal shadowland in terms of its value as a precedent (given that the Supreme Court in *O'Brien,* on effectively the same facts as *Callaghan*, saw itself as acting and able to act consistently with *Brennan* despite the distinction of fact to which Peart J. adverted in *Callaghan*), there is nothing in the judgment of Charleton J. in O'Brien to suggest that he differed from the observation of Peart J. in Callaghan that

*"The duty of the District Judge is not to ensure that the applicant is conveyed to Court by means of a bench warrant, possibly against his will, in order to make certain that the applicant avails of his rights."*

21. In fairness, Charleton J. does indicate in *O'Brien*, at para.7,that there might be occasion when a person could be compelled to attend for sentencing, though offhand it is difficult to conceive of instances where this would occur when a person has been given every opportunity to attend for sentencing, is perfectly capable of attending for sentencing and simply has not done so or does not wish to do so. And, whatever the precise ambit of Charleton J.'s observation in this regard, the court is entirely certain that neither he nor the Supreme Court intended that the State should evermore engage in a game of 'catch me if you can' in which persons who have been convicted of or pleaded guilty to offences can thereafter avoid sentencing until a judge issues a bench warrant, they are then located and arrested by the Gardaí and brought to court at public expense, and any mitigating factors that they might wish to raise demanded of them, in order that the sentencing court might take any (if any) such factors into account. A sentencing hearing is in some ways as much an opportunity for an accused-turned-convicted person, as it is doubtless an ordeal. That this repeated opportunity was not seized by Mr White is not, with every respect, something that he can now seek, as a matter of law, to lay at the learned District Judge's door. And it is not a breach of the principle of *audi alterem partem* for a judge to proceed to sentencing when a convicted person has been offered repeated opportunities to be heard, advised that if he does not avail of a last opportunity that matters will have to proceed to sentencing, and still declines to speak or to place his legal team in a position where they can speak for him, in this instance to apprise the sentencing judge of any mitigating factors perceived by that person to present. If matters were otherwise, convicted persons could bring the sentencing process to a halt tomorrow simply by declining to speak following conviction.

**Part 8**

**Conclusion**

22. Mr White has the court's commiserations that his sister was seriously unwell, and its felicitations at the birth of his child. But that he would not attend in court on the last date because he missed his bus, when a later bus would have served him just as well, and that he appears never to have apprised his legal team of such mitigating factors as he wanted raised when at any time he could have done so, these are not lapses for which the learned District Judge is responsible; they are, with all respect, Mr White's alone. For the reasons indicated, above the court does not consider that the learned District Judge erred at law in proceeding to sentencing Mr White when and how she did. The court is therefore coerced as a matter of law into declining Mr White all of the reliefs that he now seeks.

23. In closing, the court notes that Mr White, tragically, has a brother who died in Mountjoy Prison. As a result, he has indicated himself to have a very real fear of being imprisoned there. The court does not wish or seek to intrude upon the discretion of the Prison Service as regards the terms of Mr White's imprisonment, but would respectfully draw the Service's attention to this particular concern on his part.