Neutral Citation Number: [2010] IEHC 284

THE HIGH COURT

JUDICIAL REVIEW

2009 1332 JR

BETWEEN

JOHN LYNCH

APPLICANT

AND

DISTRICT JUDGE DAVID ANDERSON

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Kearns P. delivered on the 9th day of July, 2010

The applicant herein was arrested on the 28th March, 2009 on suspicion of burglary. He was detained and interviewed and made an admission that he had entered a building with the intention of stealing tools with a view to selling same. He was charged with an alleged offence of burglary under s. 12(1)(b) and (3) of the Criminal Justice (Theft and Fraud) Act, 2001. He was also charged with an alleged offence under s. 13 of the Criminal Justice Act, 1984. The latter alleged offence gives rise to no issues in the present case.

The matter first came before the District Court on the 1st April, 2009 when the court heard evidence of arrest, charge and caution. On 8th July, 2009 an outline of the facts was given to the court, jurisdiction was accepted, a plea of guilty entered and a date for hearing set.

The case came on for hearing on the 4th December, 2009 when counsel on behalf of the applicant made a preliminary point at the outset of the hearing seeking the dismissal of the burglary charge on the basis that there was a fundamental defect in the charge sheet, namely, that it did not disclose an offence under section 12(1)(b) and (3) of the Act of 2001. The particular charge sheet alleged that on the 28th March, 2009 at an address in Kildare the applicant, having entered a building as a trespasser "did commit an arrestable offence to wit burglary therein contrary to section 12(1)(b) and (3) of the Criminal Justice (Theft and Fraud Offences) Act, 2001."

Counsel on behalf of the applicant submitted that the offence of burglary under s. 12(1)(b) and (3) of the said Act had two constituent elements, namely, a trespass and a subsequent arrestable offence. It was submitted that it was insufficient merely to specify that an arrestable offence had occurred and that the additional phrase "to wit, burglary" on the charge sheet was meaningless. On this basis, counsel submitted that the first named respondent did not have jurisdiction to convict in terms of the said charge sheet. The case presenter acting on behalf of the second named respondent submitted that the charge sheet contained sufficient information as it specified that a burglary had occurred and that this was all that was required under s. 12 of the said Act. After considering the matter, the first named respondent indicated that he was satisfied that the charge sheet was valid, holding that to do otherwise would make "nonsense" of the section.

The applicant then changed his plea to one of guilty whereupon the first named respondent, following a plea in mitigation sentenced the applicant to ten months imprisonment and fixed recognisances for the purposes of any appeal in the applicant's own bond of €100 with an independent surety of €1000, half of the said sum to be lodged.

While the applicant has now served and completed his sentence, leave to bring the present judicial review proceedings was granted by the High Court (Peart J.) by order dated 21st December, 2009.

By way of relief, the applicant seeks an order of *certiorari* quashing the order of the first named respondent made on the 4th December, 2009, convicting the applicant of an offence contrary to s. 12(1)(b) and (3) of the Criminal Justice (Theft and Fraud Offences) Act.

The grounds upon which the application is made are, quite simply, that the court did not have jurisdiction to convict the applicant as the charge sheet was defective in a fundamental respect in failing to specify the arrestable offence alleged with sufficient particularity or at all. It is thus claimed that the order convicting the applicant was made without or in excess of jurisdiction. It is further maintained that the conviction order is bad on its face in that it does not contain sufficient information to show that the applicant has been convicted of a criminal offence in accordance with law.

On the hearing in this Court, it was submitted on behalf of the applicant that, notwithstanding the fact that he entered a guilty plea to the said charge, he is not debarred from challenging the conviction as the guilty plea followed immediately upon an erroneous ruling of a fundamental nature by the first named respondent. It was further submitted that an order of *certiorari* must issue *ex debito justitiae* to quash a conviction order which contains a fundamental error which renders the order bad on its face.

In response it was argued on behalf of the respondent in the District Court that burglary had a 'common sense' meaning and was generally understood to mean entering a building to commit a theft. It was also submitted that the applicant was not in any way prejudiced by the wording of the charge sheet as he had at all material times understood the nature of the charge that he was facing. Furthermore, as was submitted to this Court, the case presenter would undoubtedly have been allowed to amend the charge sheet to cite theft as the arrestable offence if he had chosen to do so, given that the law permits the amendment of a defective charge sheet where its substance is nonetheless clear to a defendant. In those circumstances it was submitted that this is not a

case in which an order for *certiorari* should be made *ex debito justitiae*. Even if such was the case, relief should be refused in circumstances where the applicant has disentitled himself to the relief sought by his conduct. Judicial review is a discretionary remedy and it was submitted that in this case the applicant's conduct militated against the granting of certiorari when balanced against the interests of the community and the fair prosecution of a criminal offence. No objection had been raised to the charge until the date for hearing on 4th December, 2009. Furthermore, the applicant had admitted the offence to Gardaí from the outset.

DECISION

I am of the view that the applicant is entitled to the relief sought in this case.

The importance of properly particularising a charge of burglary was emphasised in the Supreme Court case of *The State (M) v. O'Brien* [1972] I.R. 169 in the course of which Ó Dálaigh C.J. stated as follows (at p. 178):-

> *"Section 25 (1) of the Larceny Act, 1916 enacts that "every person who in the night—(1) breaks and enters the dwelling-house of another with intent to commit any felony therein . . . shall be guilty of an offence called burglary . . ." The District Justice's order certified that the evidence given constituted prima facie evidence that the prosecutor had committed the offence. But what offence? With intent to commit what felony ?The prosecution in the charge did not specify what felony."*

He also stated at p. 181:-

> *"There is no room for doubt that the charge should have specified the felony alleged to have been intended by the prosecutor. In the absence of this, it was impossible in law for the District Justice to certify that the evidence given constituted prima facie evidence that the prosecutor had committed the offence . It follows that the District Justice had no jurisdiction to make the order certifying as he did."*

In the present case, the particular arrestable offence referred to on the charge sheet was burglary. At the hearing, it was suggested by the case presenter that burglary was generally understood to mean entering a building to commit a theft. However, it is certainly the case that the offence of burglary may be particularised as involving offences other than theft such as entering with intent to commit such offences as criminal damage or assault causing harm. In my view to particularise the offence of burglary as involving the offence of burglary is meaningless and amounts to a failure to specify an arrestable offence.

I am less impressed with the contention that the Order should be made *ex debito justitiae* as occurred in *The State (Vozza) v. O'Flynn* [1957] I.R. 227. In that case Kingsmill Moore J. characterised that particular basis for granting relief in the following terms:-

> *"Here we have a wrong of a continuing character at issue, and a defective order operating as a blot on character. Injustice has been done …and certiorari should issue ex debito justitiae."*

I have difficulty in applying those particular qualities to the facts of this case in circumstances where at all material times the applicant admitted the particular offences and failed to challenge any of the evidence led on behalf of the prosecution. In his judgment in *The State (Abenglen Properties) v. Corporation of Dublin* [1984] I.R. 381, O'Higgins C.J. stated:-

> *"In the vast majority of cases, however, a person whose legal rights have been infringed may be awarded certiorari ex debito justitiae if he can establish any of the recognised grounds for quashing; but the court retains a discretion to refuse his application if his conduct has been such as to disentitle him to relief or, I may add, if the relief is not necessary for the protection of those rights. For the court to act otherwise, almost as of course, once an irregularity or defect is established in the impugned proceedings would be to debase this great remedy."*

If this were a case where the applicant had failed to raise the jurisdictional point until after the hearing had been disposed of, I would exercise my discretion against granting relief notwithstanding the manifest error on the face of the charge sheet and conviction order in this case. However, the invalidity of the charge sheet was raised at the outset of the hearing in this matter. This was therefore not a case where the applicant sat on his hands hoarding a valuable legal point for deployment at a later time by way of judicial review application if the case outcome was not to his liking. While I regard with a certain amount of scepticism the suggestion that the applicant's guilty plea was a direct result of the erroneous ruling of law by the first named respondent, the fact nonetheless remains that the ruling made by the first named respondent was indeed erroneous.

In those particular circumstances, I do not believe that this a case of which it may be said that the applicant's conduct disentitles him to relief. A particular legal point which was open to him to raise was in fact raised and given that the first named respondent ruled incorrectly thereon it seems to me that the applicant is entitled to the order sought.