THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 199
[284/17]

Birmingham P.
Mahon J.
Hedigan J.

MICHAEL O'BRIEN

APPELLANT

v.

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Birmingham P. delivered on the 11th day of June 2018

Introduction

1. This is an appeal from a decision of the High Court (Binchy J.) delivered on 21st March 2017. Having set out the nature of the reliefs sought, the High Court judge comments "the background to the application is, to say the least, unusual". Those remarks were echoed by counsel on behalf of the appellant who added that, in his experience, the case was unique.

Background

2. The appellant was charged with two offences contrary to the Road Traffic Act, an offence of driving while disqualified and an offence of driving without insurance. Both charges arose out of the same incident. The appellant pleaded guilty in Naas District Court and was sentenced to a term of four months imprisonment and was disqualified from holding a Driving Licence for a period of forty years in respect of the first offence of driving while disqualified. The second offence of driving without insurance was taken into consideration and no specific penalty was imposed. It may be noted that the now appellant came before the District Court as someone with fourteen previous convictions for road traffic offenses, including two for driving while disqualified and five for driving without insurance.

3. Following his conviction in the District Court, the now appellant lodged an appeal in the Circuit Court and also instituted proceedings by way of judicial review. These judicial review proceedings sought to quash the decision of the judge in the District Court on a large number of grounds, including an alleged failure to consider making a community service order *in lieu* of a custodial sentence; an inadequate enquiry into legal aid and an error on the face of the record in describing the offence in respect of which convictions were recorded properly. However, at this stage, only one ground remains of relevance and that is a contention that is a contention that the disqualification from driving for a period of forty years was wholly unreasonable and was contrary to law.

4. The judicial review proceedings came on before Kearns P. who, in a judgment of 19th December 2014, ruled against the applicant on all grounds. The applicant appealed that decision to the Court of Appeal which delivered a decision on 10th November 2014. Kearns P. was upheld in all regards save one. The Court of Appeal considered the imposition of the 40-year disqualification to be unjustifiable and to be "outside the zone of what might be considered reasonable by any standard". The Court of Appeal observed that it would have been within the jurisdiction of the District Court to impose a disqualification for a substantial period having regard to the applicant's significant previous record. It stated, however, that that was not something that the Court of Appeal could do and therefore that the disqualification order must be quashed. It then went on to say, and this is at the heart of the present appeal:

> "[t]hat does not mean that the whole conviction is erased, however, because it is an ancillary disqualification that is severable from the sentence which was imposed without jurisdiction. There follows also a period of mandatory disqualification under the Road Traffic Acts. The Court will allow the appeal on this point. If Mr. O'Brien appeals his sentence of imprisonment, it will be open to the judge to consider the ancillary disqualification issue afresh and to impose a more appropriate disqualification, if so minded."

5. The applicant subsequently sought leave to appeal to the Supreme Court. However, on 28th June 2016, the Supreme Court determined that the applicant had not demonstrated that he met the constitutional criteria for appealing to that Court.

6. At that stage, matters took an unusual turn. The applicant sought leave of the High Court to seek judicial review of the decision of the District Court dated 9th May 2013, as altered and/or affected by the decision of the Court of Appeal dated 10th November 2015. Leave was granted on 27th September 2016 by Moriarty J. essentially on the grounds that the effect of the order of the Court of Appeal is that a conviction is now recorded against the applicant, but without the imposition of a consequential disqualification order. The order, which is an order of the District Court (although one amended by the Court of Appeal) therefore lacks jurisdiction. The applicant was charged with the offence of driving without insurance and the

judge in the District Court was required by virtue of s. 26(5) to impose an order of disqualification. However, the judge in the District Court failed to impose any penalty at all in relation to the offence, instead taking it into consideration when imposing sentence for the offence of driving without a Driving Licence. The order convicting and sentencing the applicant contained an error on the face of the record as it did not contain a consequential order of disqualification from driving as required by the statute. The High Court judge in his decision pointed out that the outcome of the first judicial review proceedings was that Ryan P. expressly declined to quash the conviction in its entirety. Accordingly, insofar as the applicant was now seeking an order to quash what remained of the order of the District Court, the respondent was arguing, and the High Court agreed, that the issue was *res judicata* because the Court of Appeal had already declined to make such an order. The High Court dealt with the argument that it was not open to the Court of Appeal to sever the penalty from the conviction by saying that the argument had to be seen in the context that one of the reliefs sought in the first judicial review proceedings was the very relief granted by the Court of Appeal.

7. The High Court judge felt that it could hardly be open to the applicant, having obtained an order for which he applied, to come back to the Court by way of a new application for judicial review to seek an order quashing what remained of the order of the District Court on the grounds that the very order that he obtained had rendered the remainder of the order of the District Court invalid. He felt that if that was the situation, the applicant should not have applied for such an order in the first place, or at a very minimum should have canvassed the issues before the Court of Appeal.

Grounds of Appeal

8. There are some eight Grounds of Appeal that allege a number of errors on the part of Mr. Justice Binchy in both fact and law. They may be summarised as follows;

> (i) the High Court erred in failing to hold that the order constituted an error on the face of the record by failing to record a consequential order of disqualification upon conviction as per the statute (Ground 1);
> (ii) the High Court erred in failing to hold that the District Court order, as amended by the Court of Appeal, is lacking jurisdiction absent a disqualification order (Ground 2 and 3);
> (iii) the High Court erred in failing to hold that the District Court order deprives the appellant of his constitutional right ot appeal from disqualification at first instance (Ground 4);
> (iv) the High Court erred in holding that the appellant is seeking to quash an order of the Court of Appeal rather than an order of the District Court (Ground 5);
> (v) the High Court erred in holding that the appellant sought an order quashing the disqualification order separate to the conviction; (Ground 6)
> (vi) the High Court erred in holding that the matter ought to have been canvassed before the Court of Appeal and is consequently *res judiciata* (Ground 7 and 8).

Discussion

9. Throughout the hearing of the appeal before this Court, counsel on behalf of the appellant has asserted again and again that he is not seeking to challenge the earlier decision of the Court of Appeal presided over by Ryan P. In fact, he says that far from challenging the earlier decision that he actually seeks to rely on it.

10. Notwithstanding the firmness and the eloquence with which it is submitted that there is no attempt being made to challenge the decision of the Court of Appeal, I find myself unable to accept that is the situation. The first relief sought in the statement required to ground the application for judicial review is "an order of *certiorari* by way of judicial review quashing the order of Judge Coughlan dated 9th May 2013 in Naas District Court as altered and/or effected by the order of the Court of Appeal dated 10th November 2015".

11. Despite counsel's protests to the contrary, it seems to me clear that at the core of the present proceedings is a challenge to the decision of the Court of Appeal of 10th November 2015. If there was ever any doubt about that, and it is hard to see how there could be, that doubt is removed by the affidavit of Mr. Matthew Byrne, solicitor, grounding the application for leave to seek judicial review, and in particular, that portion of the affidavit that deals with the application that was brought to the Supreme Court to hear a further appeal. At para. 10, Mr. Byrne says:

> "I say that one of the grounds of appeal sought to be argued before the Supreme Court was that the order of the Court of Appeal was in error as it purported to quash the 40 years disqualification attaching to the order and conviction without quashing the actual conviction."

At sections 4(1) and 5(2) of the application for leave to appeal to the Supreme Court, the applicant highlighted that the effect of the Court of Appeal's order was to render the District Court order bad for want of jurisdiction.

12. I find myself in agreement with the judge in the High Court that:

> "[i]t can hardly be open to the applicant, having obtained an order for which he applied, to come back to the Court by way of a new application for judicial review to seek an order quashing what remains of the order of the District Court, on the grounds that the very order that he obtained has now rendered the

remainder of the order of the District Court invalid. If that is the case, the applicant should not have applied for such an order in the first place, or at a minimum, should have canvassed the issue before the Court of Appeal."

13. On behalf of the appellant, the point has been made that the law in relation to reopening cases where what was intended to be a final judgment has been delivered has moved on since Ryan P. delivered his judgment. Regard must be had to the developments seen in cases such as *DPP v. Nash* and *Bailey v. Ireland*. I, too, believe that it would have been possible and desirable to have canvassed with the Court of Appeal over the days after judgment was delivered the issues that were emerging. In my view, that is particularly so given the contents of para. 34 of the judgment of the Court of Appeal quoted above. In the course of argument, I raised with counsel whether the remarks of Ryan P. meant that he had envisaged that the mandatory disqualification period provided for by the Road Traffic Acts would take effect, and whether he was referring to the possibility that that mandatory minimum period of disqualification might be increased to a more appropriate period by a Circuit Court judge if an appeal was brought to that Court. Counsel did not agree that the passage bore the interpretation that I was suggesting and indicated that the reference to a more appropriate disqualification was to be contrasted, not with the minimum period of disqualification provided by statute, but rather to be contrasted with the forty years imposed by Judge Coughlan. Even if counsel is right and the Court of Appeal had not contemplated that the mandatory disqualification period provided for by statute would take effect, the passage quoted shows that the Court was aware and conscious of the mandatory disqualification period. If the difficulties that were emerging had been drawn to the Court's attention, that might have offered a very simple resolution.
14. The appellant has been at pains to make the point that, ordinarily, a conviction and sentence are not severable and that if the sentence is quashed, then the conviction is also quashed, referring to cases such as *Tangney v. Kerry District Justice* [1928] IR 358, and State *(Carr) v. District Justice for Youghal* [1945] IR 43. However, it seems to me that different considerations apply, for what is in issue is not a primary punishment such as a fine or imprisonment, but a secondary punishment or secondary consequence such as disqualification from holding a Driving Licence.
15. The appellant says that the situation in which he finds himself is a very unusual one and may in fact be unique. He says that, ordinarily, someone convicted of an offence under the Road Traffic Acts that carries with it a mandatory consequential disqualification as the offences of driving while disqualified and driving without insurance do, would be afforded "two bites of the cherry". This is to say that they would have the question of the period of disqualification considered in the District Court and, if dissatisfied with the outcome there, would have the option of appealing to the Circuit Court where the matter would be considered afresh. He was entitled, so the argument goes, to two fair hearings, but as things stand, would only receive one. It seems to me that argument ignores the fact that it was the appellant who isolated the period of disqualification and identified it as an appropriate subject for challenge. He sought to quash the disqualification of forty years and succeeded in doing so.

Conclusion

16. In urging this Court to intervene, counsel on behalf of the appellant has pointed out that the earlier decision of the Court of Appeal was to grant *certiorari* and that the effect of that was to expunge from the District Court order all reference to disqualification. He says such a situation cannot be allowed stand and that the matter can only be put right by intervention from this Court.
17. This Court accepts that what has occurred was, as indeed the High Court judge and counsel for the appellant has observed, unusual. Nonetheless, there are some things that are clear. This Court cannot reverse an earlier decision of the Court of Appeal, whether by some procedure analogous to judicial review or by appeal or otherwise. If it was perceived that a major difficulty had arisen, the way to deal with it was by bringing the matter back before the Court that gave the decision at the earliest possible moment. In my view, there is now just no basis for this Court intervening.
18. Accordingly, I would dismiss the appeal.