Neutral Citation Number: [2007] IEHC 121

THE HIGH COURT

JUDICIAL REVIEW

[2006 No. 927 J.R.]

BETWEEN

PATRICK BURKE

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND
JUDGE JAMES McNULTY

NOTICE PARTY

Judgment of Mr. Justice Charleton delivered on the 16th day of April, 2007

1. In July, 2006 the applicant appeared before Judge James McNulty, the notice party, charged with assaulting a woman contrary to s.3 of the Non-Fatal Offences Against the Person Act, 1997. The charge was contested but, at the end of the evidence, the applicant was convicted. There is no complaint as to the manner in which Judge McNulty conducted the trial. Instead, what happened afterwards became the subject of a *habeas corpus* application which, by leave of McKechnie J., has been transformed into this Judicial Review application.

2. The best means by which to set out the controversy before this court is to quote from the report of Judge McNulty as to what occurred in the District Court in county Cork in the immediate aftermath of the conviction of the applicant:-

> "Having found the accused guilty, having heard details of his previous convictions and the plea in mitigation and having considered all the facts and circumstances of the case, I stated that the appropriate penalty for the court to impose was a custodial sentence.
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> At this stage the courtroom was filling as citizens and gardaí and practitioners arrived for the ordinary sitting of the court scheduled to commence at 11 a.m. I informed the defence solicitor that while I had come to the conclusion that a custodial sentence was warranted, I did not want to make a hasty decision under pressure of other business at that time and that I wished to reflect on the term of the custodial sentence which would be appropriate.
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> I expressly stated that the court wished to consider the deterrent
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> element, as far as the accused was concerned, as well as the penal aspect for the crime committed, and I suggested that the accused should reflect on his conduct and his future behaviour.
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> I was contemplating the possibility of a partly or wholly suspended sentence, conditioned on the good behaviour of Patrick Burke towards all citizens and specifically Sharon Stewart, but I did not express this view in my exchange with the defence solicitor.
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> I directed that the accused be remanded in custody to appear before the court seven days later on Tuesday 18th July, for sentencing. I acknowledge that the defence solicitor asked me to defer a decision on penalty for the purpose of obtaining a Probation Service report on the accused and I declined this suggestion, referring to his previous convictions.
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> I again indicated to the defence solicitor that the court in determining the sentence would consider any assurance that Patrick Burke might wish to offer to the court and to Sharon Stewart as to his future conduct and I would also take into consideration any offer of compensation which he might wish to make to Sharon Stewart in respect of her injury.
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> The defence solicitor asked me for an indication of what sum might be expected. I indicated the sum of €1,000 and said that in suggesting this low figure I was taking into account the fact that Patrick Burke was currently not working, and that there might have been some small element of provocation, or even contributory negligence (to borrow a term from civil law) on the part of Sharon Stewart, to resume the row inside the pub after the row outside in the beer garden had turned physical.
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> The defence solicitor then said it would be difficult for her client to raise the amount suggested while in prison awaiting sentence. I replied that I would not expect the compensation to be paid on the next remand date and that I would be more interested in what Patrick Burke would have to say about his future conduct.
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> I then commenced the scheduled business for the court for Skibbereen that day.
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> Subsequently, the defence solicitor made a further application requesting me to make a final order on sentencing and to fix recognizance for the purpose of appeal. I confirm that I declined this further application on the basis that I had not yet determined the penalty or concluded dealing with the case".

3. Within a matter of days of the remand of the applicant in custody, an application was made before McKechnie J. for an order of *habeas corpus*. When the applicant was produced before the court, the state applied for him to be admitted to bail. This has remained the situation since that time.

4. The statutory scheme setting up the District Court differs in the disposal of criminal cases from the Circuit Criminal Court and the Central Criminal Court. Appeals from the District Court are to the Circuit Court and are by way of full rehearing. Statute specifies a rehearing in the case of an appeal to the Court of Criminal Appeal from the Circuit Criminal Court or the Central Criminal Court but this is a mis-description. In those cases, the rehearing takes place on an analysis of the transcript of the proceedings. Where an appeal takes place in a criminal case to the Circuit Court from the District Court, that appeal is, in fact, is a true rehearing. The function of the Circuit Court judge, in hearing the appeal, is to either affirm the conviction recorded in the District Court or to acquit the accused. If, for example, every witness in the case had died between the time the Circuit Criminal Court or the Central Criminal Court had tried a case and it coming on for rehearing in the Court of Criminal Appeal, it would make no difference to the outcome, as the witnesses are never re-heard. Where a District Court conviction is appealed, however, all of the witnesses must present themselves

again before the Circuit Court judge and the case is considered afresh; the only difference from the original hearing being that the Circuit Court judge will be aware that an appeal would not be taking place had a conviction not being previously been recorded against the accused, for that offence, in the District Court.

5. In the light of this statutory scheme, it is not surprising that it is argued that the same scheme for admission to bail should govern the liberty of the accused both before and after his or her conviction in the District Court. The right to bail arises from the presumption of innocence and when it is displaced by a conviction the entitlement to bail, as of right, ceases; *The People (Attorney General) v. O'Callaghan* [1966] I.R. 501. Any right of the accused to bail on his conviction in the Circuit Court or Central Criminal Court, is subject to him appealing his conviction or sentence to the Court of Criminal Appeal and is subject to discretion not right. The situation in the District Court is less clear. The entry of an appeal operates by law as an automatic stay on the execution of the sentence of the court, under the exercise of an entitlement conferred by statute on the accused to have the entire case reheard. It therefore seems probable that the entry of an appeal against a District Court conviction requires the application of similar criteria for admission to bail, as when the accusation is first made. The prosecution are entitled, however, to make an application to revoke bail, once it has been granted, at any time. This is usually done on notice, but circumstances of emergency might allow, in the most extreme of cases, for an initial application *ex-parte*. In all cases, no matter what the original court before which the charge is laid, the High Court retains its original jurisdiction over bail. I note that Professor Dermot Walsh considers the revocation of bail at paragraph 10.23 of his *Criminal Procedure* (Dublin, Thompson Roundhall, 2002) and states that the prosecution or the accused can return to the court for a variation or revocation of the bail order, in the light of changed circumstances from the time that the bail order was first made. Any entitlement to reconsider bail in the light of a conviction in the District Court is strictly limited by the existing statutory scheme, which requires the automatic fixing of recognizance for the purpose of an appeal, on request, and that same should be fixed in a reasonable amount.

6. The entitlement of an accused to appeal a District Court conviction is not based on the Constitution but solely on the statutory provisions to which I now turn. Part III of the Criminal Procedure Act, 1967, as amended, governs the power of the District Court to remand accused persons. Sections 21 and 22 of that Act reads as follows:-

> "21 Where an accused person is before the District Court in connection with an offence the court may, subject to the provisions of this Part, remand the accused from time to time as occasion requires.
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> 22(1) Where the District Court remands a person or sends him forward for trial or sentence, the Court may
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> (a) commit him to prison or other lawfully custody,
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> (b) or release him conditionally on his entering into a recognizance with or without sureties.

In this Part, references to 'custody' are to a committal under paragraph (a) and references to 'bail' are to a conditional release under paragraph (b).

> (2) The Court may, instead of taking a recognisance from a person in accordance with subsection (1), to fix the amount of the recognizance in which he and his sureties, if any, are to be bound with a view to their being subsequently taken in accordance with subsection (3) and in the meantime commit him to custody in accordance with subsection (1) a).
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> (3) Where the court fixes the amount of recognisance under subsection (2), the recognizance may thereafter be taken by a justice of the court or by a peace commissioner.
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> (4) Where a person is brought before the court after remand under subsection (1) the court may further remand him."

7. The power of the District Court to commit a person accused of a crime to custody is subject to the right to liberty guaranteed under Article 40.4.1 of the Constitution. The District Court, as with other courts, in exercising its statutory powers, does so subject to the Constitution. It will therefore only refuse to release the accused on bail, or as the legislation puts it release him or her conditionally on his entering into a recognisance without or without sureties, where it is shown as a probability that he or she may interfere with witnesses, or abscond, or use his liberty to commit further offences. These criteria apply to all courts up to the point where a conviction allows a court to impose a custodial sentence. Where a conviction is recorded it is a matter for the court to decide its own criteria for admission to bail, if time is needed before the sentence is imposed; because of the necessity, for example, for a psychiatric or probation report. Where a conviction has been recorded before the Circuit Court or the Central Criminal Court, the entitlement to bail ceases where the offence is one which is punishable by imprisonment. That, however, does not seem to be the position with the District Court.

8. Section 24 of the Criminal Procedure Act, 1967, as amended by the Criminal Justice (Miscellaneous Provisions), 1997 allows the District Court to provide for a period of remand in custody of up to fifteen days, and this limit cannot be exceeded unless the accused and the prosecutor consent. This section, however, refers to a remand pending trial. After a finding of gulity, the Consolidated District Court Rules provide in Order 101 Rule 6 for an automatic stay of execution on the consequences of a conviction in criminal cases:-

> "On the entering into a recognisance according with Rule 4 of this order, execution of the order appealed against shall be stayed and the appellant, if in custody, shall be released. In any case where a monetary penalty has been imposed on the appellant, or the appellant has been required to perform a condition, the court may, not later than six months from the expiration of the time allowed by the order for payment of the penalty, or for the performance on the condition issue a Warrant of Committal in default of such payment, or in default of such performance, as the case maybe, unless the appellant shall have entered into a recognisance".

9. The form of the rule could not be clearer. Once the accused appeals his conviction and enters into a recognizance, the order convicting him, including the imposition of a penalty on him, is stayed pending the outcome of his appeal to the Circuit Court.

10. The question as to whether a District Judge must, notwithstanding that he or she has found that the accused is guilty, allow him or her to enter into a recognisance is settled by the Consolidated District Court Rules, which provides in Order 101 Rule 4:-

> "Subject to the provisions of Order 12 Rule 20 of the Rules, where a person is desirous of appealing in criminal proceedings or in the case of an order for committal to prison under the Enforcement of Court Orders Act, 1926 and 1940, a recognisance for the purpose of appeal shall be fixed by the court. The amount of the recognisance in which the appellant and the surety or sureties, if any, are to bound shall be fixed by the court and shall be of such reasonable amount as the

court shall see fit. An application to the court to fix the amount of the recognisance may be made ex-parte. A sum of money equivalent to the amount of the recognisance may be accepted in view of a surety or sureties. The recognisance shall be in accordance with one of the forms 101.4, 101.5, 101.6 Schedule D as the case may be, and shall be entered within the fourteen day period fixed by Rule 1 of this order."

11. In an earlier version of the relevant rule it said "a recognisance for the purpose of appeal may be fixed by the court". The absolute entitlement to have a recognisance fixed for the purpose of appeal is confirmed by the change in the Rule: this makes it a requirement that a District Judge must fix a recognisance once any accused person who has been convicted is "desirous of appealing in criminal proceedings".

12. In this case, it was argued that a trial is not concluded until such time as a decision is made as to the sentence; *Deaton v. Attorney General* [1963] I.R. 170. While this is correct, in any criminal proceedings a person may appeal either the conviction or the sentence. If a person convicted before the District Court indicates that he or she wishes to immediately appeal the conviction, because they continue to assert their innocence notwithstanding the conviction recorded, then they have an entitlement pursuant to the provisions of O. 101, r. 4 to have a recognisance fixed in a reasonable amount to enable the order of the court convicting them to be stayed. The notice of appeal is a stay, of itself, on any order of the District Court that imposes a sentence: *Darby v Anderson* [2002] 4 I.R. 481. If the accused were on bail prior to conviction, this should ordinarily be the foundation on which a recognisance is determined for the purposes of an appeal.

13. In *Howard v. Early* [2000] I.E.S.C. 34 the applicant was convicted before the District Court of an offence which carried a monetary penalty only. She was, nonetheless, remanded in custody and for a period in excess of the fifteen days provided for by s. 24 of the Criminal Procedure Act, 1967, as amended. Denham J., on behalf of the Supreme Court, warned that the District Court should not use its powers to remand in custody as a form of *de facto* sentencing. This, I would infer, is not what the learned District Judge was attempting to do in this case. In my judgment, rather, an error was made as to the relevant powers.

14. The question remains as to whether a District Judge has any powers to remand an accused person in custody after there has been a conviction and an expression that the accused is desirous of appealing that conviction and of having a recognisance set for that purpose. I am only entitled to decide an issue with reference to the facts of the case before me. The accused had been, prior to his conviction, on bail subject to particular conditions. The learned District Judge was entitled to continue that bail subject to the same conditions as set out in a fresh recognisance upon conviction. The terms of a recognisance, if considered afresh, should be set in a reasonable sum, or subject to reasonable conditions, and may, in appropriate cases, require a surety or sureties. The entitlement to appeal, and to have the orders of conviction and sentence stayed pending appeal, is, nonetheless, absolute. I cannot see that any argument that a criminal case only ends with the sentencing of the accused can have any application given the clear wording of the District Court Rules. An accused may appeal once he is convicted and his entitlement to appeal does not depend on the imposition of a sentence. Were that to be so, then the case might be remanded from time to time and so replace the sentencing process with one of punishment through deliberate remand. I am certain that this is not what the learned District Judge wished to do in this case.

15. It could be that, after a conviction has been recorded, the hour of the sitting is so late that a recognisance may not conveniently be fixed until the following sitting; but that situation should be avoided as far as possible. It could also be that following on conviction, the entering into of an appropriate recognisance might depend on the availability of a suitable surety. If same were not immediately available, remand in custody to the next sitting, to allow for the attendance of appropriate sureties, might be appropriate.

16. None of these, necessarily very rare, situations prevailed here. Consequently, I would hold that once the learned District Judge had been explicitly asked to fix recognisance for the purpose of an appeal that this should have been done in a timely manner so as to allow the order of conviction, or the order of conviction and sentence, to be stayed.