THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 192

Birmingham J.
Mahon J.
Hedigan J.

Appeal No. 2016/329

Mervin White

Appellant

-and-

District Judge Anne Watkin and The Director of Public Prosecutions

Respondents

JUDGMENT of Mr. Justice Hedigan delivered on the 15th of June 2017

Introduction
1. This is an appeal brought against the judgment and order of Barrett J. of the 26th May, 2016, and 7th June, 2016, respectively. The appellant's application for relief by way of judicial review was refused. The appellant had sought to quash the order of the first respondent of the 10th December, 2014, wherein she imposed a two month custodial sentence and a seven year driving disqualification in his absence in relation to number of road traffic offences which occurred on the 12th October, 2012. The appellant had entered a guilty plea on the 1st October, 2014.

2. Prior to the 10th December, 2014, the appellant had three times previously failed to attend for sentencing resulting in the matter being marked peremptory for the fourth occasion. The judge asked his legal representative to convey to him that the matter would proceed in his absence. On two of those occasions the appellant offered reasons, being the birth of his child and a seriously ill relative. On this fourth occasion the appellant claimed to have missed the bus and opted not to get a later bus. There were also four failures to appear prior to the plea being entered.

3. The appellant also sought an order of prohibition to prevent the respondents taking any further steps in relation to the charges and a declaration that the sentence should not have been imposed in his absence as it was in excess and/or without jurisdiction and contrary to fair procedures and natural and constitutional justice.

4. The High Court judge noted that the appellant had repeated opportunities to attend which were not seized. That, as a matter of law he stated, could not be laid at the District Court judge's door. It was not a breach of the principle of *audi alterem partem* to sentence when the convicted person had been given repeated opportunities to be heard, had been advised that this was the last opportunity and that sentencing would proceed in his absence, and still declined to speak or put his legal representatives in a positon to speak for him.

Appellant's Submissions
5. It was the appellant's submission that the High Court judge erred in failing to correctly apply the established jurisprudence, particularly *O'Brien v. District Judge John Coughlan* [2016] IESC 4, to the appellant's case.

6. It was submitted that the judge incorrectly interpreted the Supreme Court decision in *O'Brien*. The appellant's case should not have been distinguished from this case. The High Court judge failed to recognise that the *ratio* of *O'Brien* means that in the circumstances of the instant case a significant custodial sentence should not have been imposed in the appellant's absence. The Court was referred to the comments of Charleton J., at para. 11, where he referred to *Brennan v. Judge Desmond Windle* [2003] 2 ILRM 520, [2003] IESC 48 and noted that if conviction takes place in the absence of the accused and the court is of the view that a custodial sentence is appropriate, where this is not invariably predicated from the offence, the sentencing hearing should be adjourned.

7. It was submitted that as in the present case, in *O'Brien* the accused knew the sentencing date and did not appear. The Court was referred to para. 12 of Charleton J.'s judgment where he held that the requirements of natural justice outlined in Brennan equally applied to that case and referred to Geoghegan J.'s comments that it would be a failure to afford a trial in due course of law if the judge had in mind to impose a particularly long sentence such as four months and the offence was not one which would invariably attract a custodial sentence.

8. The Supreme Court in *O'Brien* upheld the High Court finding that it is appropriate before a serious sentence is imposed to issue a bench warrant. It was submitted that the High Court judge erred in failing to recognise that *O'Brien* is authority for the principle that an accused can waive his right to attend at trial but not sentence. Where he fails to attend for sentence the District Court judge must adjourn or issue a bench warrant to secure the accused's attendance and ensure compliance with fair procedures.

9. The appellant's case should not have been distinguished from *O'Brien* where there was a unitary process of trial and sentence. The facts were not heard until the sentencing date and conviction was recorded on that date meaning there was a unitary process of conviction and sentence. Further it was not relevant as to whether the appellant should have been given a significant sentence in his absence.

10. The High Court judge failed to recognise that in the District Court the judge must ensure fair procedures and a trial in due course of law even if the accused fails to safeguard those rights himself.

11. The decision in *O'Brien* supersedes *Callaghan v. Governor of Mountjoy Prison* [2007] IEHC 294 and so the ratio therein should not have been applied. An accused may waive his right to be present at the trial but not the sentencing hearing. The judge erred in relying on determinations in Callaghan that had led to a conclusion which was overturned in *O'Brien.*

The Second Respondent's Submissions
12. The respondent submitted that the High Court judge's decision was correct. The findings on the facts and the law were careful and considered. He correctly and logically applied *O'Brien* and distinguished it from the instant case which involved a very different

factual situation.

13. It was submitted that in *O'Brien* the accused did not appear on the trial date. The trial took place in his absence and then the judge proceeded to impose a five month custodial sentence. The Court was referred to the High Court decision, *O'Brien v. District Judge Coughlan and the Director of Public Prosecutions* [2011] IEHC 330, where Kearns P. held that the judge was entitled to determine guilt or innocence but where he was minded to impose more than a short term custodial sentence failure to make some effort to ascertain if there was a valid excuse for not attending was a breach of fair procedures. The Court was referred to Kearns P.'s reasoning that the Court had to follow the Supreme Court in *Brennan* and that "[w]hile a brief custodial sentence may not give rise to such a requirement" it arises with significant sentences and in that case it should either have been adjourned or a bench warrant issued. Kearns P.'s decision was affirmed in the Supreme Court where Charleton J. stated there was no reason to depart from *Brennan* and at para. 11 cited from that judgment where Geoghegan J. noted the trial judge didn't consider an adjournment or make enquires relating to service. Also that imposing a sentence as long as four months where the offence would not invariably attract a custodial sentence was a failure to "afford the applicant due process and/or fair procedures or natural/constitutional justice".

14. It was submitted that the convictions in *Brennan* and *O'Brien* were quashed because there was no effort to determine if there was a *bona fide* reason for non-attendance nor an effort to secure attendance. In the former the accused had not been notified of the trial date. The instant case is entirely different. The District Court judge made every effort to secure the appellant's attendance; he had full knowledge of the hearing and chose not to attend.

15. There was no requirement for a trial, the appellant having already pleaded guilty. He was given every opportunity to appear for sentence. Even on the date of sentence the judge waited until 1.20 pm. With no acceptable excuse given at this stage the judge was entitled to conclude that there was no bona fide reason for the appellant's absence and that the appellant had deliberately and wilfully declined to avail of his right to attend and be heard. This is particularly so given the previous warning that the matter would proceed in his absence. There is no explanation for his non-attendance as he could have gotten a later bus. He was aware of court procedures and it was farcical to aver that he thought he would miss his sentence, particularly as the later bus got to Heuston Station at 10.30 am. The one time he had appeared in court in the proceedings, he arrived at 12.45 pm and had a bench warrant cancelled. Thus, this case can be distinguished due to sentencing having been adjourned on three occasions. The appellant refused to avail of these opportunities.

16. The High Court judge reviewed *O'Brien*, *Brennan* and *Callaghan* and distinguished the facts of each from the instant case at paras. 15 and 16. The judge then, at paras. 17 and 18 applied the principles from O'Brien and noted that there was nothing in the sequence of events which was inconsistent with O'Brien.

17. It is not accepted that *O'Brien* sets down a hard and fast rule that a bench warrant must issue in every case before sentencing. The High Court judge correctly identified first, that those three cases involved factual situations where the trial judge made no efforts to ascertain whether there was a *bona fide* reason for non-attendance. Second, that the *ratio* of those cases goes no further than to state that efforts must be made to ensure an accused is aware of the sentencing hearing and has an opportunity to attend.

18. It was submitted that the High Court judge's reference to Callaghan showed that he was clearly aware of its status post *O'Brien*. He merely observed that there is nothing in *O'Brie*n that differs from the observation in *Callaghan* that there is not a duty on a District Court judge to ensure that every accused was conveyed by bench warrant against his will to ensure that he avails of his rights. This point was made in the context of a person such as the appellant who chooses not to go to court and then claims the sentence in absentia was a breach of fair procedures by the judge.

19. It was submitted that though not elaborated, Charleton J. in *O'Brien* envisaged that there can be a waiver of constitutional rights depending on the factual circumstances.

20. The respondent rejected the submission that the High Court judge erred regarding the unitary process of the trial and sentence. These findings were relevant in that they specifically related to the repeated opportunities given to the appellant to attend prior to sentencing which took the case far from the factual matrix of *O'Brien* or *Brennan.*

Decision

21. The question before the Court is whether the District Court judge could proceed to sentence the appellant in his absence to a two month prison sentence in circumstances where he had repeatedly and consciously failed to appear for sentence on three prior dates and had been warned that on the fourth occasion the matter would proceed in his absence. The appellant, who has a history of previous convictions and is well familiar with court procedures, seeks to call in aid the discretionary remedy of judicial review to quash his sentence on the grounds that there has been a breach of fair procedures.

22. The charges relate to an incident on the 12th October, 2012. The appellant did not appear on four occasions prior to his plea of guilty and three separate bench warrants were issued on foot of that non-attendance. The third bench warrant was cancelled when he appeared late in court on the 1st October, 2014. On that date he pleaded guilty and the matter was adjourned for sentencing in the normal way to the 22nd October, 2014. He failed to appear on that date. The matter was adjourned to the 29th October. The Court, on that date, was told that the appellant's partner was having a baby and that he could not attend. The judge accepted the excuse and remanded the matter to the 12th November, 2014, for sentence. On that date, the Court was told that he was unable to attend due to the illness of a relative in hospital. The prosecution agreed to an adjournment. The learned District Court judge adjourned the matter for sentence to the 10th December, 2014, but told the appellant's legal representative to inform the appellant that if he did not appear on the next date the sentence hearing would proceed in his absence.

23. On the sentence date of the 10th December, 2014, counsel for the appellant on instructions informed the Court that the appellant had missed his early bus from Limerick and therefore would not attend court. The judge let the matter stand to see if the appellant could get a later bus to attend court. She noted he had been late for court on a previous occasion and had arrived at 12.45 pm so she allowed the matter stand to enable him to attend later in the day. The prosecuting Garda informed the Court that there were a number of buses during the morning from Limerick to Dublin. The learned District Court judge let the matter stand until 1.20 pm. At that stage there had still been no appearance by the appellant and no further explanation. She proceeded to sentence the appellant in his absence. She heard evidence from the Garda about the circumstances of the offences and of his previous convictions. The judge took particular account of the fact that the appellant had two previous convictions for driving without insurance and one previous conviction for drunk driving and imposed a prison sentence of two months.

24. The appellant seeks to rely upon the decisions in *Brennan* and *O'Brien*. It must be noted that in both of these judgments the trial judge made no effort to ascertain whether there was a *bona fide* reason for non-attendance and did not make efforts to secure the attendance of the accused before sentencing. The situation could scarcely be more different in this case as can be seen from the

above. In fact, the opposite is the case. The learned District Court judge made every effort to attempt to ensure the attendance of the appellant at the sentence hearing. Thus the factual situation is readily distinguishable.

25. In the Supreme Court in *O'Brien* Charleton J. cited, at para. 11, a passage from Brennan where the Supreme Court held that consideration of sentence should be adjourned where the judge is of the view that a prison sentence may be appropriate in circumstances where such a sentence might not be invariably predicted. Geoghegan J. at pp. 534 of *Brennan* stated the following:-

> "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 District Court judge should have satisfied himself that the applicant did in fact know about the case. Nowhere is it suggested … that the judge even considered an adjournment or that he made any further inquiries relating to service. In those circumstances the court hearing the judicial review ought to have drawn the inference that no such inquiries were made and, of course, it is established that the case went on, on the day it was listed."

Earlier in *O'Brien* dealing with the right to due process Charleton J. observed at para. 6:-

> "Thus, while 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."

Moreover, in a case to which the Court was not referred, Murphy J. in *John Lawlor v. District Judge Desmond Hogan and the Director of Public Prosecutions* [1993] ILRM 606 at p. 610 stated:-

> "If a trial judge is satisfied that the accused has consciously decided to absent himself from the trial (at a time when his presence is not essential to enable some particular procedure to be complied with) then the trial judge would be entitled in his discretion to proceed with the trial in the absence of the accused."

26. As noted above it is quite clear that the District Court judge did everything that she could to ensure the attendance of the appellant for his sentence. She had already on three separate occasions adjourned the matter upon the failure of the appellant to attend in court. It was clear beyond doubt that the appellant was aware of his case being in court on all four occasions. Her efforts were met with an obdurate and persistent failure to attend. She was entitled to conclude that the appellant had consciously decided to absent himself from his trial. In the light of the law cited above, the judge was entitled to proceed with the hearing in the absence of the appellant. The appeal is dismissed.