THE HIGH COURT
JUDICIAL REVIEW

[2004 No. 170 J.R.]

BETWEEN

THOMAS FOLEY

APPLICANT

AND
HER HONOUR JUDGE CATHERINE MURPHY AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

Judgment of Ms. Justice Dunne delivered on the 26th day of October, 2005

1. This is an application for an order of *certiorari* by way of judicial review to quash the conviction and sentence imposed by the first named respondent on the applicant in respect of an alleged assault on one John O'Sullivan contrary to s. 2 of the Non Fatal Offences Against the Person Act, 1997 imposed at a sitting of the Dublin Metropolitan District Court at Dun Laoghaire, County Dublin on 4th September, 2003. The grounds upon which relief is sought are as follows:-

> I. That the learned District Judge convicted and sentenced the applicant in respect of, *inter alia*, allegations found by her to have been proven but in respect of which no criminal charge had been preferred.
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> II. The said order was made in excess of jurisdiction and was contrary to natural and constitutional justice and fair procedures and furthermore was made in breach of the principle that justice must not only be done but be seen to be done.
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> III. The penalty imposed was opposed otherwise than in accordance with the Criminal Justice (Community Service) Act, 1983, the applicant not being a person coming within the provisions of s. 2 thereof.
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> IV. There is an error on the face of the record.

2. An affidavit of Brian McLoughlin was sworn herein on 27th February, 2004, verifying the facts relied on in support of the application. There was no replying affidavit.

3. The events which led to the conviction and sentence imposed by the first named respondent on the applicant herein occurred on 1st December, 2001. It is not disputed that on that night the applicant who had been attending a function in the Killiney Court Hotel left the hotel in a state of "considerable intoxication and agitation" and outside the hotel proceeded to damage the headlight of a taxi which had arrived at the hotel. As a result of the applicant's behaviour the Gardaí were called and two Gardaí arrived at the Killiney Court Hotel namely, Garda Seamus Muldowney and Garda John O'Sullivan. As a result of the incident involving the headlight and the subsequent interaction of the applicant with the Gardaí, a total of four summonses were served on the applicant. The first was in respect of criminal damage to the taxi. The second related to an assault contrary to s. 2 of the Non Fatal Offences Against the Person Act, 1997 in respect of Garda Seamus Muldowney at Killiney Court Hotel, the third summons was also in respect of a s. 2 assault, this time in respect of Garda John O'Sullivan and it was stated to have occurred at Loughlinstown Hospital and the final summons was in relation to an alleged assault causing harm contrary to s. 3 of the said Act. The last summons was ultimately struck out and it is not involved in these proceedings.

4. The applicant pleaded guilty to the charge in respect of criminal damage. The applicant pleaded not guilty to the two charges in respect of s. 2 assault. Accordingly a trial took place before the first named respondent and evidence was heard on 12th March, 2003, and 21st May, 2003. A verdict was delivered by the first named respondent on 10th June, 2003, and sentence was imposed at a hearing on 4th September, 2003. Somewhat unusually, a transcript was made of the hearings and the transcript was exhibited at the letter (A) in the affidavit of Brian McLoughlin.

5. I do not propose to refer in detail to the evidence that was given before the first named respondent in respect of the matters complained of. Suffice to say that there was a significant conflict of evidence between the evidence of the two Gardai and the evidence tendered on behalf of the applicant as to what occurred at the hotel. The applicant himself did not give evidence but a witness was called on his behalf, a Dara Gildea, did give evidence. It was alleged that excessive force was used by the Gardaí in arresting and restraining the applicant. It was not in dispute that as a result of injuries occasioned to the applicant, he was brought to Loughlinstown Hospital following his arrest for treatment. As to the events that occurred at the hospital, again there was a conflict of evidence. During the course of the evidence it transpired that Garda Muldowney had used his baton on the applicant but did not report to his superiors the use of his baton as required under regulations. This was the subject of a critical comment by the first named respondent in respect of this aspect of the case before her.

6. Having heard the evidence in respect of the alleged s. 2 assault on Garda Muldowney at the Killiney Court Hotel, the first named respondent acquitted the applicant in respect of that matter. In respect of the second assault charge, namely that alleged to have occurred at Loughlinstown Hospital in respect of Garda O'Sullivan the first named respondent stated as follows:-

> "Now in relation to the s. 2 summons for Garda O'Sullivan, I am satisfied that Garda O'Sullivan, from the evidence was hit in the face first, in the nose and in the mouth. There was bleeding from the nose and the mouth, that he was hit again in the head in Loughlinstown Hospital and there was an attempt to bite his arm, and in relation to those matters I am convicting you of assault."

7. It was submitted on behalf of the applicant herein that the reference to the hitting of Garda O'Sullivan in the nose and mouth causing bleeding was a reference to events that had occurred at Killiney Court Hotel and not at the hospital. Accordingly it is argued that as that incident in respect of Garda O'Sullivan had never been the subject of a charge the applicant could not be convicted on a non existent charge. It is further argued that the first named respondent took into account irrelevant material and took the view that the applicant was guilty of an offence with which he had not been charged. It is argued that this was also dealt with in sentencing and that the first named respondent sentenced the applicant on the basis of both alleged assaults, and not simply in respect of that with which he had been charged. It is submitted that it is a violation of the principles of natural and constitutional justice for a Judge to convict and sentence an accused person on the basis of an additional alleged assault with which he has never been charged and which was alleged to have taken place at an earlier time and in a different location to the offence with which he was charged. This is particularly so where the first named respondent had acquitted the applicant of the sole charge arising out of the events at Killiney Court Hotel in respect of the assault on Garda Muldowney. The conviction in those terms is, it is submitted, invalid.

8. By way of response counsel on behalf of the respondent submitted that the first named respondent had simply convicted the applicant in respect of the s. 2 assault on Garda O'Sullivan at Loughlinstown Hospital and that that was the clear interpretation of the words used by the first named Respondent in the sentencing remarks quoted above.

9. Having considered the submissions of both parties on this point I am satisfied that the first named respondent convicted the applicant in respect of the summons before the court namely, that he had assaulted Garda O'Sullivan at Loughlinstown Hospital contrary to s. 2 of the Non Fatal Offences Against the Person Act, 1997. In the sentencing remarks the learned Trial Judge, having referred to the various incidents that occurred, described the fact that Garda O'Sullivan had been hit in the face, the nose and the mouth. She referred to bleeding from his nose and mouth. She then went on to say "he was hit again in the head at Loughlinstown Hospital and there was an attempt to bite his arm, *and in relation to those matters*, I am convicting you of assault." I am satisfied that by reference to the use of the words underlined above the learned Trial Judge was clearly limiting the conviction in respect of assault to the incidents that occurred at Loughlinstown Hospital. As I have noted already it was submitted on behalf of the applicant in this regard that the sentence was imposed on the basis of an additional assault. Following a careful reading of the transcript I can find nothing therein which could give rise to that conclusion. Accordingly, so far as any challenge based on the argument that the applicant was in effect convicted of an assault with which he had not been charged, I am not satisfied that the applicant is entitled to relief on that ground.

10. The second issue raised on behalf of the applicant was that the penalty imposed was imposed otherwise than in accordance with the Criminal Justice (Community Service) Act, 1983, the applicant not being a person coming within the provisions of s. 2 thereof. Section 2 of the Criminal Justice (Community Service) Act, 1983 provides as follows:-

> "This Act applies to a person (in this Act referred to as an 'offender') who is of or over the age of 16 years and is convicted of an offence for which, in the opinion of the court, the appropriate sentence would but for this Act be one of penal servitude, of imprisonment or of detention in Saint Patrick's Institution, but does not apply where any such sentence is fixed by law."

11. On 10th June, 2003, having delivered the verdict in respect of the s. 2 assault, the first named respondent went on to deal with a number of matters relevant to the issue of sentence. Having indicated that she thought the matter would be best dealt with by a limited period of community service she said as follows:-

> "Which is a way you can contribute further to the local community. To do that, I have to have a report from the probation services that you are suitable for community service. That will take approximately I think two months or thereabouts to come to hand. So I will put the matter in for a date… in September… for that report and then if that is favourable, I am not going to make a default provision today.., I don't want to do that. So I will see to the matter myself in September."

12. The matter came back before the first named respondent on 4th September, 2003. There was a satisfactory probation service report before the court and accordingly the learned Trial Judge made an order for forty hours community service to be completed by the applicant. She then fixed recognizances in the event of an appeal. No reference was made by the first named respondent to imprisonment. No provision was made in the order for any term of imprisonment. In these circumstances it was submitted on behalf of the applicant herein that a consideration of the appropriate sentence of imprisonment for a particular offence was an essential precondition to the exercise of the statutory power pursuant to the Criminal Justice (Community Service) Act, 1983 to sentence an accused to community service. Accordingly it was argued that the failure to do so deprived the first named respondent of jurisdiction in relation to the making of such an order. The applicant further argued that the failure to address the issue of a sentence of imprisonment is reflected in the order of the District Court drawn up on 24th October which recites as follows:

> "That the said offence being an offence for which, in the opinion of the Court, the appropriate sentence would be one of imprisonment for the period of 0."

13. In these circumstances it was argued that the terms of the order fail to address the statutory pre-condition and are in conflict with and are inconsistent with the express statutory requirement that the court be satisfied that a period of imprisonment would otherwise be appropriate for the offence. A number of authorities in support of the contention that the failure of an order to demonstrate the essential preconditions to its validity are fatal were relied on by Counsel for the applicant *(State (Roche) v. Delap* [1980] IR 170, *State (Browne) v. Feran* [1967] IR 147, *D.P.P. v. Dunne* [1994] 2IR 537 and *Simple Imports v. Revenue Commissioners* [2002] IR 243.)

14. Notwithstanding the matters referred to in the preceding paragraph it is further argued on behalf of the applicant that the matter is more fundamental than an error on the face of the order. It is argued that the first named respondent failed to consider the relevant issue which she was required by statute to consider in imposing sentence. Relying on the authority of the *State (Holland) v. Kennedy* [1977] IR 193 it is argued that a failure to consider a statutory precondition to the exercise of a jurisdiction deprives the decision maker of jurisdiction. That was a case in which there had been a failure to consider the general character of a juvenile prior to making an order certifying him as "unruly" for the purposes of imprisoning him pursuant to the provisions of Part 5 of the Children Act, 1908. It was held by the Supreme Court that the District Judge should have obtained and considered evidence of the general character of the prosecutor at the time when his sentence was being considered and that the evidence that he was of so unruly a character as described in the relevant provision of the Act was a pre-condition of the issue of certificate authorised thereby. In the circumstances, the District Judge had no jurisdiction to impose on the prosecutor a sentence of imprisonment.

15. Reference was also made to a further error on the face of the record namely the fact that the order of 24th October, 2003, recited that the applicant had pleaded guilty to the charge of which he was convicted when, in fact, he had pleaded not guilty. Finally it is submitted that in the circumstances referred to the first named respondent acted without jurisdiction in imposing a sentence of community service on the applicant without having first addressed the relevant statutory precondition to the making of such an order, namely that the offence of which the applicant was convicted warranted a sentence of imprisonment.

16. Counsel on behalf of the second named respondent referred to the fact that having heard submissions on 10th June in relation to sentence the learned Trial Judge indicated at that stage that she was minded to impose a community service order, subject of course to a favourable probation report being obtained. Thereafter on 3rd September, 2003, the requisite satisfactory probation report was before the court. A community service order providing for forty hours work was imposed as previously indicated by the first named respondent. Counsel referred to certain other preconditions required to bring into effect the possibility of a community service order. For example, the offender must be a suitable person for the making of such an order. Equally, the offender must have consented to the making of such an order.

17. It is conceded by counsel for the second named respondent that the first named respondent did not expressly refer to a term of imprisonment as being appropriate in the circumstances of the case. However, it is argued that it can be implied that that was a conclusion reached by the first named respondent. It is argued that when the first named respondent first indicated that she was minded to impose community service order she also stated that she would not make "a default provision" on that date. Thus it is argued that she had clearly indicated that she had determined that a prison sentence was otherwise suitable but that rather than impose a term of imprisonment she was minded to impose a community service order instead. Accordingly, she met the requirement provided by s. 2 of the Criminal Justice (Community Service) Act, 1983 namely, that the court must be satisfied that imprisonment or detention would otherwise be appropriate. The section does not require any particular term of imprisonment or detention to be specified. Counsel also referred to the fact that any term of imprisonment a judge might specify as appropriate in the circumstances that a community service order has been made does not by reason of that fact alone operate as a default provision in the sense that such provision automatically would take effect if there is a breach of the order. In that regard reference was made to the provisions of s. 7 subs. 4 of the Criminal Justice (Community Service) Act, 1983 which provides as follows:-

> "An offender who fails, without reasonable excuse, to comply with a requirement of subsection (1) shall be guilty of an offence and, without prejudice to the continuance in force of the community service order, shall be liable on summary conviction to a fine not exceeding £300."

18. Section 8 of the Act provides as follows:-

> "8. (1) Where an offender is convicted of an offence under section 7 (4), the court, in lieu of imposing a fine under that section, may
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> > (a) if the community service order was made by the District Court in the district of residence, either revoke the order or revoke it and deal with the offender for the offence in respect of which the order was made in any manner in which he could have been dealt with for that offence if the order had not been made, or
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> > (b) if the community service order was made by the District Court in a district court district other than the district of residence or by another court, remand the offender to the District Court in that other district or to that other court to be dealt with in accordance with subsection (2).(2) Where, by virtue of subsection (1) (b), an offender in respect of whom a community service order is in force is brought or appears before a court, the court shall either revoke the order or revoke it and deal with the offender for the offence in respect of which the order was made in any manner in which he could have been dealt with for that offence if the order had not been made."

19. Having referred on 10th June, 2003, to the possibility of a community service order being made and referring to but not fixing a default provision at that time it is submitted that the first named respondent had clearly decided that a prison sentence was otherwise suitable but by way of alternative a community service order should be imposed instead.

20. Finally a number of submissions were made by counsel on behalf of the second named respondent in respect of the fact that the order of the District Court records incorrectly that the applicant had pleaded guilty when he had in fact pleaded not guilty. Counsel referred to the judgment of Finlay P. in the case of *State (Sugg) v. O'Sullivan* unreported, High Court, June 23rd 1980 in which he stated as follows:-

> "The fundamental requirements of a good order on conviction are that it will set out in clear and unambiguous terms the precise offence by reference to statute in the case of a statutory offence and by reference to an acceptable common law definition in the case of a common law offence of which the accused was found guilty and that furthermore it will contain such material facts as will identify the manner in which the offence was committed, the date upon which it was committed and the place where it was committed so as to prevent in effect the person so convicted from ever being charged with the same offence again and so as to leave him with a record of the matter in respect of which he was convicted on which he could safely ground a plea of autrefois convict were he ever to be charged with the same offence again."

21. Reference was also made to the decision of the Supreme Court, per Keane J. in the case of *Murphy v. D.P.P. and McDonnell* [2004] 1IR 65 which expressly approved that statement. Accordingly it is argued that none of the flaws referred to in that decision appear in the present case and it is further argued that the error is one which would readily be corrected under the slip rule of the District Court rules 1997. Finally counsel on behalf of the second named respondent referred to the discretionary nature of the remedy being sought. It is argued that the court may refuse to quash an order which is correct in substance though wrong in form. It is also argued that in the present case the applicant although represented by solicitor and counsel in the District Court did not object to any of the matters complained of in relation to the conviction or sentence imposed. Further it was submitted that the error complained of by the applicant herein was an error within jurisdiction. Reliance was placed on the statement of O'Higgins C.J. in the case of *State (Abenglen) v. Dublin Corporation* [1984] IR 381 where he stated:-

> "The purpose of *certiorari* is to supervise the exercise of jurisdiction by such bodies or tribunals and to control any usurpation or action in excess of jurisdiction. It is not available to correct errors or to review decisions or to make the High Court a Court of Appeal from the decisions complained of."

22. Reliance was also placed on the judgment of Ó Caoimh J. in the case of *Murray v. Linnane* unreported, High Court, July 31st, 2002, in which he stated as follows: "This court is concerned with the decision making process and not the correctness and point of law of the decision (s) of the respondent as the relief of certiorari is not concerned with the merits of the decision itself and this court cannot be constituted as a further court of appeal in relation to the charges alleged against the applicant."That statement was approved by the Supreme Court in delivering its judgment in the same matter on 27th April, 2005.

Conclusions

23. It is undoubtedly the case that there is an error on the face of the record in this case insofar as it indicates that the applicant pleaded guilty to s. 2 assault. This is not in dispute. However, as indicated above counsel on behalf of the second named respondent has urged that judicial review is not an appropriate remedy in respect of this error for a number of reasons. I have to say that I cannot disagree with his arguments. The error is one easily capable of being remedied and does not require judicial review for the purpose of correcting the error. In the circumstances I am satisfied that I should not grant relief by way of judicial review in respect of that aspect of this case.

24. The final issue raised in this case relates to the provisions of the Criminal Justice (Community Service) Act, 1983 and whether it is a necessary part of the order in such cases that a period of imprisonment be indicated as an alternative to the community service

order. Perhaps this issue could be clarified by putting the question a different way. Can a court impose a community service order on a defendant convicted of an offence in circumstances where the court has decided not to impose a sentence of imprisonment or detention but rather is minded to impose a fine on the defendant? Clearly, that cannot be the case. Section 2 of the Act as referred to above makes it clear that the Act applies to a person who is convicted of an offence for which in the opinion of the court the appropriate sentence would be imprisonment or detention. Accordingly it is clear that a community service order is not a stand alone form of sanction apart from imprisonment or a fine for a person convicted of an offence. It is not the appropriate method of dealing with a person convicted of an offence where the appropriate sentence would be the imposition of a fine or some lesser form of penalty. Accepting that a community service order can only be imposed as an alternative to a term of imprisonment or of detention, it must be asked is it necessary for the court to specify:

(a) that a term of imprisonment for the particular offence is the appropriate sentence and

(b) the term of any such imprisonment.

25. Having considered the various authorities opened to me and the submissions made herein and in particular having considered the provisions of the Criminal Justice (Community Service) Act, 1983 I have come to the conclusion that in order to show that the Court has the jurisdiction to make such an order a necessary precondition to the imposition of a community service order is the provision of what has been described as a "default provision" or in other words a clear indication of what the appropriate term of imprisonment would be but for the making of a community service order. This seems to me to be the case notwithstanding the provisions of s. 7 subs. 4 of the Act or the provisions of s. 8 in relation to failure to comply with a community service order. Further, I hold this view notwithstanding that Section 2 of the Act does not expressly provide any specific term of imprisonment or detention to be specified.

26. Further, it seems to me that the specific term of imprisonment or detention should be recited in the court order thus demonstrating that the court has exercised its jurisdiction appropriately. I am reinforced by my view in this regard by the fact that clearly at the hearing on 10th June, 2003, the first named respondent had it in mind that a default provision was required, declined to indicate what the nature of the default provision would be on that date and unfortunately omitted to do so on the final hearing date in September, 2003. An order which recites, as the order in this case does, that "the appropriate sentence would be one of imprisonment for the period of zero" is, in my view, not a compliance with the precondition. In the circumstances I am satisfied that the applicant is entitled to have the order quashed.