Neutral Citation Number: [2007] IEHC 96

THE HIGH COURT
JUDICIAL REVIEW

[2007 No. 22 JR]

BETWEEN

FRANK WALSH

APPLICANT

AND
JUDGE GEOFFREY BROWN

RESPONDENT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

Judgment of Mr. Justice O'Neill delivered on the 16th day of March, 2007

1. In this case the applicant obtained leave of this court (Peart J.) on the 15th January, 2007 to apply by way of judicial review for orders of *certiorari* to quash three orders of the respondent whereby the applicant was convicted of offences pursuant to s. 3 and s. 15 of the Misuse of Drugs Act, 1977. The matter coming before the court, the respondent or notice party, did not oppose the making of orders of *certiorari* as sought, but the notice party sought an order pursuant to O. 26(4) of the Rules of the Superior Court remitting the matter to the District Court so that it could be reconsidered and a decision reached in accordance with the findings of this court. This application was resisted by the applicant.

2. The facts relevant to this matter are as follows.

3. The applicant was before the District Court in Ballaghadreen on the 26th October, 2006 on foot of four summonses.

4. The first of these alleged an offence to the affect that on the 10th October, 2004 at a place unknown in Castlerea, Co. Roscommon the applicant was in possession of a controlled drug to wit cannabis resin for the purposes of supply. The second offence alleged was that on the 10th October, 2004 at a place unknown in Castlerea, Co. Roscommon the applicant was in possession of a controlled drug to wit cannabis resin. The third offence alleged was that on the 30th October, 2004 at Loughlynn, that the applicant was in possession of a controlled drug to wit cannabis resin for the purposes of supply. The applicant also was facing a charge of failing to appear contrary to s. 13 of The Criminal Justice Act, 1984. The following paragraphs, namely paragraphs 5,6, 7, 8, 9 and 10 of the affidavit of Alan Gannon a solicitor for the applicant describes what happened in the District Court on the 26th October, 2006.

> "(5) I say that prior to court and acting on my client's instructions I indicated to the prosecuting Garda, Sergeant Clesham that the applicant would be willing to plead guilty and that in return it was requested that some of the charges would be withdrawn. Those "negotiations" were successful and it was agreed with the prosecution that one of the s. 15 supply charges and the s. 13 failing to appear charge would be withdrawn. When the matter was called it was indicated to the court that only three charges would be proceeding, being one of s. 15 charge of possession for the purpose of supply and two s. 3 possession charges.
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> (6) I say that Sergeant Clesham gave evidence and, in the normal way on a plea of guilty, gave a précis of the prosecution case. What follows is not intended to be an exhaustive summary of the evidence given, but consists of a reasonably full account of the evidence offered by the prosecution. Sergeant Clesham stated that in October he was called to the home of the applicant's son who is a 14 year old boy who was living with his mother. The Sergeant stated that he found a small amount of cannabis resin. He stated that the boy made a statement saying his father, Mr. Walsh had given him €100.00 worth of cannabis and that €50.00 worth of it was for the boy's birthday. At the end of October the Sergeant found out Mr. Walsh was coming to Loughlynn to visit his son and the Gardaí set up a check point in the village before stopping a transit van driven by the applicant. The vehicle was subsequently taken to Castlerea Garda Station where it was searched. The Sergeant stated that bags of cement were found in the van and when the Sergeant searched them he found a lump of cannabis wrapped in paper and another packed into his sock. The Sergeant stated that he was satisfied the cannabis was to be supplied to the applicant's son.
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> (7) I subsequently called the applicant to give evidence. My purpose in doing so was so that the applicant could apologise to the court and also explain the context in which he provided cannabis to his son. I led the applicant through his evidence and covered such matters as where he was working, how many children he had, the relationship he had with the children and their mother, where they were living, the contact he had with the children and his extreme ill judgment in providing cannabis to his son. The applicant explained from the witness box that he provided cannabis to his son because he believed that his son was in danger from owing money and drugs to the people who had given him drugs previously. He stated that he simply gave his son drugs to get out of trouble. He now accepted that that was foolish and wrong and that he should have gone to the Gardaí. I was in the course of eliciting from the applicant an undertaking that he would not have contact with his son when the respondent interjected and indicated that he would ensure that the applicant would have no contact whatever with his son. I say that the respondent effectively took over at that stage and there was no more evidence heard from the accused. The first respondent described the applicant as follows:-
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> "You are a scumbag."
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> The judge went on to say that "you are going to go away". The Judge referred to the applicant as "peddling in death". The judge made reference to his driving to court that morning and listening to the Gerry Ryan radio show and a mother speaking of the story of her child who was on heroin. The applicant was ordered to stay away from his children and to have no phone contact with them. The first respondent concluded by stating "A father peddling drugs to a 14 year old child, its an absolute disgrace."
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> (8) The respondent proceeded to convict the applicant and in respect of the charge of supply of drugs on the 10th October the judge imposed a sentence of six months. The judge then went on to convict the applicant for supply of drugs on the 30th October and he imposed a sentence of five months consecutive. It was then pointed out to the judge that he could not do that because the second supply charge had been withdrawn pursuant to the arrangement reached with the prosecution. The respondent stated that the agreement had been entered into subject to the courts approval. I submitted that this was not the position and that the court was now entering into the arena between the accused and

> the prosecution, which was inappropriate. The respondent then became somewhat irate and put the matter to second calling.
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> (9) The second calling was reached a short time later and when the case was called again the prosecution fairly accepted that an agreement had been reached and that there was now before the court a single supply charge and two possession charges. The respondent then stated "I might have to revise my order". The judge then proceeded to strike out the s. 15 charge relating to the 10th October, 2004. He then turned to the two s. 3 charges on the 10th October and the 30th October, and he stated that "these are only fines there is no prison". The judge fined the applicant €300.00 under s. 3, notwithstanding that it was his first drug offence and he had pleaded guilty. A fine of €400.00 was imposed on the second s. 3 possession charge. The judge then indicated that "there was no prison attaching to that conviction either". In relation to the s. 15 charge which was before the court dealing with the offence of the 30th October, 2004 of possession for the purposes of supply, the judge increased the penalty he was originally going to give and he imposed a sentence of nine months on that charge. The judge made a further reference to the matter being "scandalous, a father peddling drugs to a 14 year old."

5. The issue which arises in this case is whether or not the court has a discretion to remit the matter to the District Court for further consideration or whether as is submitted by the applicant the court does not have that discretion because the applicant is entitled, having been put "in peril" in the District Court proceedings, to rely upon a plea of *autrefois convict* as a matter of right. In this regard reliance was placed by the applicant on the case of *Sweeney v. Brophy* [1993] 2 I.R. 202. It was further submitted that in these circumstances the applicant could not be put on trial again for the same offences, and having regard to the fact that an order of *certiorari* quashes both the order of conviction and sentence, which it is well settled are indivisible, notwithstanding that a plea of *autrefois convict* is appropriate, there being no conviction after the order of *certiorari*, the District Court could not take up the matter as if the conviction was extant and proceed to sentence.

6. It was conceded by the applicant that in the event of the court having a discretion as to whether or not to remit, that the applicant did not have "attractive" grounds for urging the court to exercise its discretion in favour of refusing to remit.

7. For the notice party it is submitted that court did have a discretion to remit and that this discretion was affected by a variety of matters such as the seriousness of the offence, the lack of blameworthiness on the part of the notice party, where in this case they had adhered to their agreement with the applicant in relation to the offences in respect of which pleas were accepted and furthermore the fact that the applicant had entered guilty pleas in respect of the three offences on which he was sentenced.

8. O. 84, r. 26(4) reads as follows:

> "(4) Where the relief sought is an order of *certiorari* and the court is satisfied that there are grounds for quashing the decision to which the applicant relates, the court may, in addition to quashing it, remit the matter to the court, tribunal or authority concerned with the direction to reconsider it and reach a decision in accordance with the findings of the court."

9. In the case of *Sheehan v. O'Reilly* [1993] I.L.R.M. 427 at 434 Finlay C.J. speaking of O. 84, r. 26(4) said the following:

> "Neither this provision or any rule similar to it was contained in the Rules of the Superior Court of 1962. It must first clearly be stated that this rule which on the face of it, gives the court a discretion as to whether or not to remit the matter in which an order has been quashed for further consideration cannot having regard to the limitation of powers vested in the rule making authority pursuant to the courts of justice Acts be a ground of any new of different power that is not already vested in the court by virtue of statue or by virtue of inherent jurisdiction. Accordingly the question which has been raised as to the exercise by the High Court on March, 25 1992 of the discretion arising under this rule must be determined in accordance with the general principles applicable to a retrial of a person in the circumstances which have arisen in this case, it not being possible to separate the order by way of sentence from the order by way of conviction…"

10. I am satisfied from this passage from the judgment of Finlay C.J. and indeed from many other applications, in other cases, of the principle, that this court does have a discretion where an application to remit is made pursuant to O. 84, r. 26(4). I do not think that that discretion is lost, where the grounds upon which an order of *certiorari* is to issue, relate to a fundamental defect in the proceeding in the District Court which is neither without jurisdiction or in excess of jurisdiction but which as mentioned in the judgment of Hederman J. in *Sweeney v. Brophy*, warrants a conclusion that a trial in due course of law is denied. In that case which was relied upon by the applicant, the applicant had fully contested the charge of assault against him. Hence having been put on trial or "in peril" in circumstances where the trial was conducted within jurisdiction but in a manner so flawed as to be a fundamental breach of the applicant's constitutional right to a trial in due course of law, the logical outcome of the quashing of the conviction and sentence by an order of *certiorari* is to treat that quashing as tantamount to an acquittal, with the consequence that the applicant would be entitled to reply on the plea of *autrefois acquit*, thereby preventing a further trial in respect of the same offences.

11. In this case the circumstances are wholly different. The applicant pleaded guilty in respect of the three offences on which he was convicted and sentenced, and in my opinion the underlying reasoning or logic which in the *Sweeney v. Brophy* case and indeed other cases led to a conclusion that the quashing of the conviction and sentence should be treated as tantamount to an acquittal could hardly apply. The applicant was a convicted person because he had pleaded guilty and his complaint related only to what was done in the sentencing hearing. Notwithstanding, in my view that the order of *certiorari* quashes both conviction and sentence, and accepting that the error of the respondent was one within jurisdiction, I cannot accept that the applicant is, as was submitted, entitled as of right (excluding any discretion in this court) to be not subject to any further trial in the District Court on these offences because of an entitlement to a plea of either of *autrefois acquit* or *autrefois convict*.

12. In the first place a plea of *autrefoic aquit* is wholly inappropriate having regard to the fact that the applicant became a convicted person by virtue of his own plea of guilty and hence the logic which impels the conclusion that an on order of *certiorari* which quashes a conviction where an accused contests the charge is tantamount to an acquittal, is entirely missing.

13. If it was to be said that the applicant was entitled to a plea of *autrefois convict*, that makes no sense having regard to the fact, that, as was indeed submitted by the applicant, the conviction along with the sentence is quashed by the order of *certiorari*.

14. This latter consequence persuades me, firstly, that the circumstances of this case require that the case of *Sweeney v. Brophy* be distinguished and secondly that the strange if not absurd result contended for by the applicant namely that he is entitled to a plea of *autrefois convict* in circumstances where the conviction is quashed or that he was a entitled to a plea of *autrefois aquit* in circumstances where he had pleaded guilty to the offences can only be avoided by permitting this court a discretion as to whether or

not the case should be remitted back to the District Court for further consideration under O. 84, r. 26(4).

15. I have carefully considered the circumstances of this case as set out in the affidavit of Alan Gannon and in particular the fact that the applicant pleaded guilty to the three offences in respect of which he was convicted and sentenced. The length of time that has elapsed since then is quite short and there is no evidence of any prejudice to the applicant.

16. In these circumstances I have come to the conclusion that I should exercise my discretion and order that the matter be remitted to the District Court for further consideration.