Neutral Citation Number: [2007] IEHC 294

THE HIGH COURT

Record Number: 2007 No. 820 SS

BETWEEN

PAUL CALLAGHAN

APPLICANT

AND
THE GOVERNOR OF MOUNTJOY PRISON

RESPONDENT

AND
THE LEARNED JUDGE PRESIDING AT COURT 51
AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTIES

Judgment of Mr Justice Michael Peart delivered on the 29th day of June 2007:

1. The background to the present application of the release of the applicant pursuant to Article 40.4.2 of the Constitution is that certain summonses arising out of alleged motoring offences, including that he drove a mechanically propelled vehicle without insurance, were served on the applicant "by way of letter box service", requiring the applicant to appear in the District Court to answer the allegations contained therein on the 2nd April 2007.

2. He failed to appear in the District Court on that date. According to an affidavit sworn by Garda McCann who was the prosecuting garda in respect of these alleged offences, and who was present in Court 51 on the 2nd April 2007 when these summonses were called, the District Judge made enquiry as to how the applicant had been served with the summonses and was informed that it had been by way of "letter-box service" at his home address, being that stated in the summonses themselves.

3. The judge in these circumstances adjourned the summonses to the 4th May 2007. In his affidavit Garda McCann states that "the judge remanded the case for this deponent to caution the defendant as to the new remand date which was fixed for the 4th of May 2007". He goes on to aver that on the 28th April 2007 at 21.00 hours he personally called to the applicant's address for the purposes of cautioning the applicant to attend Court and informing him of the adjourned date, the 4th May 2007. He says that when he called to the front door of the house he was met by "a male", and that he requested to speak to the applicant. However the applicant's mother came to the door to speak to him. He states then that "the applicant himself personally walked by the front door and stood behind the door. Same was indicated to me by Mrs Callaghan." He proceeds to aver that he then informed both the applicant and his mother of the new date for hearing of the summonses and that they would be heard at 10.30 on that date in Court 51. He also gave his calling card with these details written on the back thereof to the applicant's mother.

4. There is no reference to this visit to the applicant's house by Garda McCann in the grounding affidavit sworn by the applicant's solicitor, Declan Fahy. The contents of this affidavit presumably represent the totality of the relevant instructions taken from the applicant for the purpose of this application, and the Court must therefore act on the presumption that the applicant did not instruct his solicitor about this very relevant piece of information about Garda McCann calling to the house. I make that comment since at the hearing before me Garda McCann was cross-examined by Michael O'Higgins SC in relation to his replying affidavit, and in particular about exactly what happened when he visited the applicant's house on the 28th April 2007. The affidavit sworn by Mr Fahy states, *inter alia*, that he has been instructed and informed by the applicant that he had no notice of the proceedings leading to his conviction and sentence, and that he was never served with the summonses nor made aware by any person of his requirement to attend court.

5. During that cross-examination Garda McCann confirmed that he was in no doubt that it was the applicant who walked past the open hall door and that he remained behind the door while his conversation with the applicant's mother took place. He stated also that his mother had told her that it was the applicant behind the door. He did concede however that he had not spoken *directly* with the applicant and this concession was made in answer to questioning by Mr O'Higgins about the note written at the foot of the copy summonses before the District court which states "Cautioned in person". Mr O'Higgins sought to rely on the inaccuracy of what the District Judge had been told in that regard, given that Garda McCann accepted that he had not cautioned the applicant in person, but through his mother only. However, Garda McCann stated that he was satisfied at the time of the caution that the applicant was present at the time and heard what was being said, albeit from behind the front door. Garda McCann believes that in these circumstances it was correct to inform the District Judge, as he did, on the 4th May 2007 that the applicant had been cautioned in person to appear.

6. Garda McCann deposed in his said affidavit that on the 4th May 2007, having told the District Judge that he had informed the applicant in person of the adjourned date, he applied for a bench warrant, but that the District Judge stated that every effort had been made to have the applicant before the Court, and that if the applicant did not wish to attend Court the matter would proceed in his absence. Accordingly evidence was given as to the offences in question, and the applicant was convicted. The judge then called for evidence of previous convictions, upon which evidence was given that there were nine previous convictions, including three convictions for driving without insurance in July 2002, September 2002 and in April 2005. A sentence of three months' imprisonment was then imposed on the summonses related to driving without insurance, and he was disqualified from driving for seven years. Other summonses appear to have been taken into account.

7. Mr O'Higgins relies on the judgment of Geoghegan J. in *Brennan v. Windle* [2003] 3 IR 494 in support of his submission that the in the present case the District Judge ought not to have proceeded to sentence the applicant in his absence, whatever about convicting him, and that what he ought to have done was to issue a bench warrant to secure the attendance of the applicant before deciding on what was the appropriate punishment for the offences, and that by proceeding in such a way, the District Judge would ensure that he punished the offender rather than just the offences. The passage from that judgment on which Mr O'Higgins relies appears as follows at p.509:

> "What is argued on behalf of the applicant is that the District Court judge should not have proceeded to hear the case and impose a conviction and above all a sentence of imprisonment *without taking reasonable steps to ensure that the applicant was notified of the case given that there was no appearance*. Subsection (4) expressly confers on the District Court judge a discretion to adjourn a case for this purpose "whether because of the gravity of the events or otherwise". But even without the express statutory authorisation this is something which it would have been open to the District Court judge to have done. Although there is an onus in judicial review on the applicant where the applicant's complaint is that he was convicted and sentenced without ever knowing about the case he cannot be expected to produce evidence

proving what did or did not happen at the hearing. *The applicant, in my view, has made out a prima facie case to establish that the case should either have been adjourned or the District Court judge should have satisfied himself that the applicant did in fact know about the case. Nowhere is it suggested in the replying affidavit by Garda McCarron 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. *Once the judge would have had in mind to impose a prison sentence and particularly a sentence as long as four months* and particularly also in the circumstances that the offence in question would not invariably attract a prison sentence, *the first-named respondent failed in my opinion to afford the applicant due process and/or fair procedures or natural/constitutional justice.*" (my emphasis)

8. Mr O'Higgins submits that in the present case the applicant could not have been aware that there was a likelihood that a prison sentence would be imposed for these driving offences, and that if the District Judge had such a punishment in mind the duty to ensure the attendance of the applicant in Court for sentencing was all the greater.

9. I am afraid that I cannot regard *Brennan v. Windle* as persuasive in the context of the facts of the present case which are very different. The case can clearly be distinguished on its facts since in that case it was not contested that the applicant did not have actual notice of the summonses of which he was convicted in his absence. The only proof of service was that a garda had effected service of the summonses by delivering them in an envelope to the applicant's address. The District Judge proceeded to convict and sentence the applicant to four months' imprisonment without any adjournment of the case. This was held to have been a breach of due process, fair procedures, and natural and constitutional justice. In the present case, the District Judge adjourned the case in order to allow the prosecuting garda call to the applicant's house and notify him of the adjourned date. The Garda did just that, and I am completely satisfied not just from the averments of Garda McCann in his affidavit but from his evidence in the witness box when he was cross-examined, that the applicant was present at the front door of his house, albeit that he was behind the door rather than actually facing Garda McCann, and that he heard exactly what was being said by Garda McCann to his mother. In addition Garda McCann left his card with the necessary details written thereon, and I am entitled to infer from these facts that the applicant was fully aware of the date on which his case would be dealt with and that he voluntarily chose to absent himself.

10. I am not satisfied, as submitted by Mr O'Higgins, that the District Judge was misinformed on the 4th May 2007 that the applicant had been notified in person. I am satisfied that since the applicant was clearly present behind the door, and the Garda was satisfied at the time that it was the applicant, that the applicant was notified in person. It was the applicant who chose to remain behind the door rather than face the Garda as he was speaking. That does not mean that he did not hear what was being said. I believe that the applicant heard exactly what was said and was fully aware of the adjourned date from what was said.

11. Since I am satisfied in this regard as a fact, the relevance of *Brennan v. Windle* disappears. The ratio of that decision was based on the accepted fact that the applicant was sentenced to a term of imprisonment as a result of proceedings of which he had no notice.

12. In the present case I am completely satisfied that the District Judge did everything which was reasonably required of him in order to ensure that the applicant's rights to due process, fair procedures, natural and constitutional justice were afforded to him.

13. There is no statutory obligation as such upon the District Judge to adjourn the case in these circumstances. But s. 22 (4) of the Courts Act 1991 permits the judge to adjourn a summons in the interests of justice to enable the defendant to be notified. That section provides as follows:

> "(4) Where a summons has been issued under section 11 (2) of the Act of 1851 or section 1 of the Act of 1986 and served upon the person to whom it is directed by a means of service provided for in subsection (1) of this section and that person neither appears at the time and place specified in the summons nor at the hearing of the complaint or accusation to which the summons relates, *the District Court may, if it considers it undesirable in the interests of justice, whether because of the gravity of the offence or otherwise, to continue the hearing in the absence of the person, adjourn the hearing to such time and place as the Court may direct to enable the person to be notified in such manner as the Court may direct of the adjourned hearing*."

14. That is precisely what occurred in the present case.

15. It is important in my view to recall that the rights to due process, fair procedures, natural and constitutional justice are rights possessed of the applicant. They are his rights which he is entitled to assert. It is implicit that if he has these rights, which is the case, he is entitled to be afforded a reasonable opportunity to avail of them and a reasonable opportunity to have the benefit of them. The duty of the District Judge is not to ensure that the applicant is conveyed to Court by means of a bench warrant, possibly against his will, in order to make certain that the applicant avails of his rights. It must be the case that the applicant has the right to forego his rights if he freely chooses to do so. A bench warrant is a mechanism for bringing a person to Court who is in breach of his obligation to be in Court. In the present case the applicant on these summonses was not obliged to be in Court, but he was entitled to be provided with a reasonable opportunity of being present when his case was being dealt with should he wish to do so. I can at this stage usefully recall a passage from the judgment of O'Flaherty J. in *Rock -v- Governor of St. Patrick's Institution* (Supreme Court 22nd March, 1993, unreported), being also a case where the Applicant did not appear at the hearing of the District Court. The learned judge stated at page 8 of his Judgment:-

> "The submission is that this Defendant was not given 'every opportunity' to defend himself. In my judgment this must be construed, like every obligation which is imposed on a judicial office holder, as being one to afford every *reasonable* opportunity to a Defendant to make his defence and equip himself to make his defence.
>
> Here the District Judge was not in default: it was the Defendant who chose not to present himself in Court and, therefore, his possible entitlement to free legal aid could not be adjudicated upon by the District Judge."

16. Even though these words were spoken in the context of the exercise of a different right, it applies with no less force in my view in relation to the right to be present.

17. In the present case, if the District Judge had some doubt about whether the applicant was aware that his case was listed for hearing on the 2nd April 2007 and if he nevertheless had proceeded to convict and sentence the applicant in his absence, then the process would suffer from the very same frailties as were seen to exist in *Brennan v. Windle*, but as it happens the District Judge very wisely and correctly, in my view, decided that it could be "undesirable in the interests of justice" to proceed in the absence of the

applicant, and put the case back so that he could be notified of the adjourned date. By so doing the applicant was given a very reasonable opportunity to avail of his undoubted right to be present should he choose to do so. But more than that is not required. There would be no power in the Garda forcibly convey the applicant to Court in these circumstances, and the District Judge had no basis to issue a bench warrant since the applicant was not in breach of order or other requirement to be present, such as if he was on bail and failed to appear.

18. In relation to the submission by Mr O'Higgins that it is incumbent on the District Judge to sentence the offender and not the offence, and that for this reason it is necessary that the applicant be present so that possible mitigating factors can be taken into account, and that his attendance should have been assured in some way by the District Judge by the issue of a bench warrant, I do not agree that this is a necessary step in all cases. In the present case I accept the evidence that the District Judge called for evidence of previous convictions. When imposing a sentence of three months imprisonment on the insurance summonses and taking the remainder into account, in the context of nine previous convictions, three of which are for the same offence of driving without insurance, the District Judge cannot be considered to have imposed a sentence which was not justified. He has sentenced the offender, namely a person who has been found guilty of the same offences on three previous occasions. If the applicant has chosen not to be present for his case, having been given a reasonable opportunity of being present, the District Judge is entitled to presume that there are no mitigating factors or other circumstances to be put forward by way of mitigation before penalty is imposed. If following the imposition of such a penalty the applicant still considered it to be excessive he retained at all times his entitlement to appeal the harshness of the penalty. It is another matter altogether that the imposition of sentence in this way has given rise to an unlawful detention.

19. I am supported in my conclusion by the judgment of Murphy J. in *Lawlor v. Hogan* [1993] ILRM 606 regarding the discretion of a judge in relation to proceeding with a trial in absentia. During the course of his judgment the learned judge at page 610 identified the following:

> "1. That in so far as the judicial process in criminal matters expressly requires matters to be dealt with by or in relation to the individual accused, clearly he must be present to enable those functions to be performed.
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> 2. The right of an accused person to be present and to follow the proceedings against him is a fundamental constitutional right of the accused which every court would be bound to protect and vindicate.
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> 3. 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 notwithstanding the absence of the accused."

20. For all these reasons I am satisfied that the detention of the applicant is lawful, and refuse the application for his release.