[2020] IEHC 48

THE HIGH COURT
JUDICIAL REVIEW

[2019 No.960 J.R.]

BETWEEN

D.P. (A MINOR)

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms. Justice Mary Rose Gearty delivered on the 6th day of February , 2020

Introduction

1. This is a judicial review application in which the child Applicant, who was sentenced to detention for 6 months for stealing mobile phones, argues that he was deprived of the presumption of innocence in his Circuit Court Appeal of that sentence. Leave to review the sentencing decision was granted to his new legal team on the sole ground that the Circuit Court Judge took one occasion of post-conviction misconduct referred to in a probation report into consideration and used that evidence to justify a sentence of detention. The Applicant submits that, there having been no conviction in respect of this matter, the error was so significant that the sentencing judge thereby exceeded his jurisdiction and that his decision should be quashed by this Court. Since the leave application, it has emerged that there was evidence at the sentencing hearing of several other instances of alleged misconduct on the part of the Applicant. There was no objection to this Court considering the more extensive evidence of offending that was revealed when the DAR transcript was obtained in dealing with the sole issue identified in the leave application.

The District Court Sentence Hearing

2. In July of 2019, having pleaded guilty in the District Court, the Applicant was sentenced for the theft of three mobile phones and minor criminal damage, all offences committed during the course of three separate incidents in the City of Cork in late 2017 and early 2018. He had numerous previous convictions, mainly for two types of offence: stealing phones and road traffic offences. A probation officer offered a bleak report to the District Judge. This report [hereafter, the original report] outlined previous convictions and convictions recorded since 2017, and also referred to probation bonds having been entered in Galway and Dublin. The probation service had clearly had extensive involvement with the Applicant. The original report made it clear, and the Applicant frankly admitted to that probation officer, that he and his friends had a significant history of travelling around the country stealing phones, selling them, and sharing the money between them. In the original report, the Applicant's positive engagement with the Candle Project (an educational training centre in Ballyfermot) was acknowledged but his history of criminality, negative peer influences and lack of parental supervision were among the reasons given for not recommending further probation service involvement. The Applicant was sentenced to 6 months in detention.

The Circuit Court - the new Probation Report

3. The Applicant appealed this sentence and in November of 2019 the Circuit Court Judge heard evidence of the three theft offences, evidence of previous convictions and was presented with a positive probation report [the new report] with a single caveat: that the Applicant had come to the negative attention of the gardaí on one occasion since the date of the District Court hearing. In other words, there appeared to have been an improvement in the Applicant's behaviour, as far as this second probation officer was concerned. The officer noted, in particular, his engagement with the Candle Project and offered the recommendation that the Applicant might be permitted to engage with the probation service. While there had been three convictions recorded since the District Court sentence under appeal, all had resulted in community-based sanctions and referred to conduct pre-dating that sentence hearing and thus pre-dating the Applicant's apparent rehabilitation. These later offences were committed in Mullingar, Drogheda and Dublin. The reference to negative attention in the new report, however, being singular, created the impression that since the District Court hearing, the Applicant had undergone something of a conversion or at least that his rate of offending had reduced dramatically.

The Undisputed Evidence of Misconduct

4. Since the leave application in this case, the DAR of the sentencing hearing has been obtained. From the transcript of the proceedings, it is clear that the evidence of post-offence misconduct was not confined to a single incident. Further, it was undisputed in terms of its reliability. The prosecutor took issue with the facts in the new report, insofar as it was suggested that there was only one incident, and called evidence from two garda sergeants to the effect that various gardaí had interacted negatively with the Applicant not only on one, but on many occasions since the July hearing. The evidence was that since the July hearing, there had been several similar thefts and a car chase involving the Applicant which brought him into the neighbouring jurisdiction and required the collaboration of the PSNI. One witness referred to at least 10 further offences. The garda witnesses were not cross-examined, nor was it suggested that this evidence was not reliable. There was an argument that there was some confusion about when these incidents occurred in that one answer referred to December, rather than to July. But thereafter, the only reference to a date was July and each question and answer referred specifically offences since "the hearing", which can only have meant the July 2019 District Court hearing. It is also clear, on reading the responses on the transcript, that both witnesses were referring to new allegations rather than to recorded convictions.

5. The new report was generally positive and the Applicant might have expected a good outcome had the hearing been based on that report alone. In other words, he had significant mitigation in the new report, but its recommendation was based on an incorrect premise. The single incident of negative garda attention was corrected, at the appeal hearing, and comprised a series of theft allegations, driving and handling offences, and a car chase on the M1 which led into Northern Ireland. Both guards who gave evidence confirmed that the new report did not reflect the true nature of the Applicant's involvement with that service or with the gardaí, insofar as the probation officer was only aware of one incident of negative attention.

6. No questions were asked by defence counsel when this evidence of misconduct was given. No suggestion was made to this Court that the evidence was unreliable.

7. It was in these circumstances that the sentencing Judge heard the evidence and it is clear that he did consider it. Equally clearly, certiorari cannot be granted on the sole ground on which leave was obtained as the single incident alleged in the report did not remain a consideration at the time of sentencing; if anything, it had been completely overtaken by new evidence. It was argued that these facts raise the potential vista of unfairness, in that they suggest the Circuit Court Judge may have erred in considering the new evidence, not merely the single incident referred to in the leave application, and unfairly added to the sentence imposed. Despite the more limited ground on which leave was granted, there was no objection to the Court hearing argument on the admissibility and appropriate use of the evidence of misconduct described above and indeed the same principles apply to both.

Post-conviction Misconduct and the Presumption of Innocence

8. The presumption of innocence is a fundamental precept of criminal law the world over. It applies throughout the criminal process, including at the sentencing hearing. Its practical effect at a sentencing hearing is that evidence of a mere allegation cannot usually be taken into consideration by a sentencing court and cannot be used to increase a sentence. Equally fundamental is the principle that evidence of good behaviour is evidence of rehabilitation that may be used in mitigation in an appropriate case. As Professor O'Malley comments in the Third Edition of his book *Sentencing Law and Practice,* abstention from further offending, especially if combined with positive good character, reflects well on the defendant. The fact that the accused has turned over a new leaf is always a relevant consideration in considering what sentence is a fair and proportionate one. Good conduct, in other words, usually reduces the length of a sentence.

9. The converse does not hold true in that evidence of misconduct may not be adduced in order to increase the length of a sentence. This is clear from *R v. Kidd*, [1998] 1 WLR 604 which was considered in *DPP v. Gilligan (No 2)*, [2004] 3 IR 87, and reaffirmed in *DPP v. F.E.*, IESC 2019 85. These cases, broadly speaking, confirm that a sentencing judge is entitled to receive evidence of the circumstances surrounding an offence, even if it may tend to suggest further criminality on the part of the accused, if that evidence enables the judge (to paraphrase McCracken J. in Gilligan) to remove her blinkers. A judge may also receive evidence of later convictions (post-dating the index offence) if these are relevant to that offence e.g. if they show a pattern of behaviour. In F.E., the Supreme Court confirmed that evidence of post-offence misbehaviour cannot be relied upon in order to increase a sentence but, as set out in Kidd and Gilligan, can be used in order to put the offending into context.

10. In summary, post-offence misconduct may be relevant in considering sentence but only to put an offence into context or to reduce or eliminate the prospect of mitigation for good behaviour. If challenged, an allegation of misconduct must be formally proven to be admitted into evidence. The evidence cannot be used by a sentencing judge to increase sentence. To do so would be to punish the Applicant twice: once for the offences under

consideration and again for the new misconduct in respect of which the Applicant could expect to be sentenced in due course of law if charged and convicted in respect of that conduct, in the normal way.

Jurisdiction of the Court in Judicial Review

11. If a decision was made without jurisdiction, or in excess of jurisdiction, it should be quashed. The Court retains a discretion to withhold the remedy, depending on the facts of the case. Jurisdiction is exceeded when the decision maker clearly departs from fair procedures, acts dishonestly, with bias, or when there is an error of law on the face of the record.

12. Here, the Circuit Court had jurisdiction to sentence the Applicant. The question is whether the Judge exceeded his jurisdiction by taking an irrelevant factor into consideration. Morris J., in *Farrelly v Devally*, [1998] 4 IR 76, asked whether the facts could have justified the respondent judge in reaching the decision he did. If there is no such basis for the decision, the error is a jurisdictional one, in other words, it has deprived the judge of jurisdiction.

Application of the law to these facts

13. The reference to post-conviction misconduct in the new probation report was relevant to the probation officer's task and was clearly admissible. Indeed, had the report been more negative due to post-conviction misconduct, that too would have been admissible to explain why a community-based sanction was not appropriate, as was the case in the original report. Because the new report was based on incorrect information, the evidence of more extensive misconduct was also admissible in order to correct the mistaken premise. This was not a case to compare to Kidd or Gilligan, in other words. This case hinges on the purpose for the admission of the evidence of misconduct and whether or not the Court misused the evidence so as to exceed jurisdiction. There was no encroachment on the presumption of innocence if the facts of the subsequent misbehaviour were accepted, as in this case, whether this was the one incident referred to in the report or the more extensive offending described in oral evidence.

14. While none of these allegations were the subject of criminal convictions, the facts outlined to the sentencing Judge and the reference in the new report were not disputed in either Court so the presumption of innocence does not arise for consideration on the facts of this case and the sentencing Judge was entitled to proceed on the basis that the evidence was reliable.

15. The uncontroverted evidence was that the Applicant had repeatedly come to the negative attention of an Garda Síochána for stealing mobile phones since the offence under appeal, and on one occasion had been chased by gardaí along the M1 in an incident which required the assistance of the PSNI. This suggested that certain mitigation was not available to him. However, a judge is not entitled to use that information as an aggravating factor.

16. Here, the District Court had imposed a 6-month sentence of detention due to the extremely poor record of the Applicant who had 37 previous convictions and 77 youth

referrals. As a matter of chronological logic, the District Court sentence under appeal was imposed before the new allegations were made; they could not have arisen at that stage. Having heard the new allegations, the Circuit Court Judge commented that the probation report was clearly misleading in certain respects, including in its conclusions that the Applicant appeared to have cut his ties with associates who had been leading him astray. Having made these comments, sentence was imposed by specific reference to the previous record of convictions and without again referring to the new allegations. There was no reference to the detail of the allegations in contrast with the sentencing Judge's express references to recorded convictions and specific sentences imposed in those cases.

17. On one interpretation, urged upon this Court by the Applicant, the new allegations may have appeared to influence the Judge's decision to impose a sentence of detention but this was never expressly stated. An equally valid and more persuasive interpretation is that the Judge did as he was constitutionally required to do: he heard evidence of the previous convictions of the Applicant and also heard uncontested evidence of misconduct having taken place since the offence then under appeal. He expressed his disappointment at that development insofar as it rendered the probation report unreliable. The Judge specifically referred to the requirement that detention for a minor be a measure of last resort but nonetheless ruled that it was appropriate in this case.

18. The Applicant also urged that the Judge's comment to the effect that the garda witnesses were entitled to give positive and negative evidence so that the Court had the full picture, suggested that he therefore used the specific incidents not yet charged to justify a sentence of detention. To interpret the comment in that way would be to ignore the tenor of the evidence as a whole. Further, his comment in this regard is correct: he was entitled to hear all the relevant evidence, and this included the evidence of misconduct of the Applicant, in deciding whether or not a period of probation supervision would be appropriate.

19. The transcript makes it clear that the Applicant had been convicted of a range of very similar offences, mainly involving the theft of phones, committed all over the country from Cork and Galway to Mullingar and Dublin, before and since the original offences under consideration. In most cases, the thefts had occurred in counties far from where the young Applicant resided. These were the matters to which the Circuit Court Judge referred specifically before deciding to affirm the District Court order, which had been based on the original report recommending that probation supervision was no longer advised for this Applicant.

Conclusion

20. The Circuit Court Judge sentenced the Applicant to detention, after expressly taking into account the previous convictions of the Applicant, which were numerous. The Judge, having ordered a probation report and having heard that even its positive tone was reliably refuted by uncontested evidence, was entitled to impose a sentence of detention. Given the purpose for which the evidence of misconduct was adduced, whether that in the new report or that in the oral testimony, it was relevant and the Judge was entitled to consider all such evidence in assessing the probation officer's recommendations.

21. The 6-month period of detention is patently a sentence that could have been imposed on any accused with a comparable record for the relevant offences, even on a minor. The Judge went on to consider whether or not he would increase the sentence which had been imposed in the District Court. He did not do so. This serves to confirm the interpretation of events set out above; the allegations were not considered in order to increase or aggravate the sentence imposed. In the circumstances, no error was made by the Circuit Court Judge and certiorari is refused.