THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 138

No. 2015. No. 119

Kelly J.
Irvine J.
Hogan J.
BETWEEN/

RR (A MINOR SUING BY HIS FATHER AND NEXT FRIEND SR)

Applicant/Appellant

- And -

DIRECTOR OF PUBLIC PROSECUTIONS, HIS HONOUR JUDGE NOLAN,

HER HONOUR JUDGE RING AND THE JUDGES OF THE CIRCUIT COURT

Respondents/Respondents

JUDGMENT of Mr. Justice Gerard Hogan delivered on 29th day of June 2015

1. This appeal raises a net – albeit important – point of sentencing practice in relation to minors. Do the provisions of s. 100 of the Children Act 2001 ("the 2001 Act") requiring judges to adhere to a twenty eight day (or, in some instances, forty two day) time limit when imposing sentence on minors have the effect that once these time limits have been exceeded, there is no longer a power to impose a sentence? The issue arises in the following way.

2. The applicant is a minor who was born on 1st May 1998. He was charged with two very serious and unpleasant offences which occurred in April 2014 and subsequently pleaded guilty to these offences. In the first case the applicant and his co-accused robbed a disabled man after he alighted from a bus stop before hitting him on the head and stealing his briefcase. In the second instance the applicant and his co-accused lured an intoxicated man down a laneway in Dublin city centre, knocked him unconscious and then robbed him.

3. The applicant was returned for trial to the Dublin Circuit Court in custody, albeit with consent to bail. He was arraigned before His Honour Judge Nolan where he pleaded guilty to all the counts with which he had been charged. Judge Nolan then remanded him in custody with consent to bail to 14th February 2015 for sentence. A probation report was then ordered by the judge at the request of counsel for the defence. It is agreed that on that date all parties had overlooked the provisions of s. 100 of the Children Act 2001 ("the 2001 Act"), a provision to which I will later refer to in some detail.

4. At some point the Director of Public Prosecutions appears to have adverted to the potential issue arising by reason of the operation of s. 100 of the 2001 Act because on 24th November 2014 her counsel applied ex parte to Her Honour Judge Ring for a production order in respect of the applicant. On the following day counsel referred Judge Ring to the provisions of s. 100 of the 2001 Act and applied to have the February 14th date for sentence vacated and to have the sentence re-listed for the 28th February 2014.

5. At that hearing counsel for the applicant submitted that the effect of s. 100 of the 2001 Act was that the Circuit Court could no longer proceed to sentence once the statutory time limits had expired. Judge Ring rejected that argument. She then vacated the order which had been made by Judge Nolan on 17th October 2014 and remanded the applicant on bail for sentence on 28th November 2014. Judge Ring also directed that a probation report be made available for the 28th November 2014.

6. An application was then made to the High Court by counsel for the applicant on 17th October 2014 for leave to apply for judicial review. That application was heard on notice by McDermott J. on 27th November 2014 who granted leave to seek *certiorari* of the orders of 17th October 2014 and 25th November 2014.

7. The matter ultimately came on for hearing before Kearns P. on 27th January 2015. As the Director indicated at the hearing that she did not oppose the making of orders of *certiorari* quashing the orders of the Circuit Court which had been made on 17th October 2014 and 25th November 2014, the only issue which remained was whether the High Court should remit the matter to the Circuit Court so that the applicant could now be sentenced. The question of remittal itself turned on the antecedent question as to whether the Circuit Court could now proceed to sentence.

8. In a reserved judgment delivered on 3rd of March 2015 Kearns P. held that the Circuit Court retained such a jurisdiction to impose sentence, the expiry of the statutory time limits notwithstanding: see *RR v. Director of Public Prosecutions* [2015] IEHC 116. The applicant has now appealed to this Court on that single issue. Before considering the reasoning of Kearns P., it is necessary first to set out the provisions of s. 100 of the 2001 Act.

Section 100 of the 2001 Act

9. Section 100 of the Children Act 2001 ("the 2001 Act") provides:-

> (1) Where the court is satisfied of the guilt of a child, it may defer taking a decision to allow time for the preparation of any report requested pursuant to this Part or for other sufficient reason and for that purpose may remand the child on bail, subject to such conditions as it may think fit, or, pursuant to s. 88, in custody for, where appropriate, the minimum period necessary for the preparation of any such report but not in any case exceeding 28 days.
>
> (2) Notwithstanding subsection (1), where a child in respect of whom any such report is being prepared has been remanded on bail, the court may allow one extension of not more than 14 days for its preparation if satisfied, on application by the person preparing the report, that it is proper to do so.

(3) Any person responsible for making any such report shall make all reasonable endeavours to ensure that the report is lodged with the court at least 4 working days before the end of the period of remand."

10. Section 100 cannot, however, be read in isolation from the provisions of s. 99 which provides:-

"(1) Subject to subsections (2) and (3), where a court is satisfied of the guilt of a child, it—

(a) may in any case, and

(b) shall, where it is of opinion that the appropriate decision would be to impose a community sanction, detention (whether or not deferred under section 144) or detention and supervision,

adjourn the proceedings, remand the child and request a probation and welfare officer to prepare a report in writing (a "probation officer's report") which—

(i) would assist the court in determining a suitable community sanction (if any) or another way of dealing with the child, and

(ii) would contain information on such matters as may be prescribed, including any information specifically requested by the court.

(2) The probation officer's report shall, at the request of the court, indicate whether, and if so how, in his or her opinion any lack of care or control by the parents or guardian of the child concerned contributed to the behaviour which resulted in the child being found guilty of an offence.

(3) The court may, in addition, request that a victim impact report be furnished to it in respect of any victim of the child where it considers that such a report would assist it in dealing with the case.

(4) The court may decide not to request a probation officer's report where—

(a) the penalty for the offence of which the child is guilty is fixed by law, or

(b) (i) the child was the subject of a probation officer's report prepared not more than 2 years previously,

(ii) the attitude of the child to, and the circumstances of, the offence or offences to which that report relates are similar to his or her attitude to, and the circumstances of, the offence of which the child has been found guilty, and

(iii) the previous report is available to the court and the court is satisfied that the material in it is sufficient to enable it to deal with the case.

(5) Where a court requests a report under this section, it may at any time summon as a witness any person whose evidence in its opinion would assist it in dealing with the case."

11. It should also be noted that s. 99(1)(b) of the 2001 Act imposes a mandatory duty on the sentencing court to obtain a probation report where it considers that a custodial sentence would be the appropriate sentence: see *Allen v. Governor of St. Patrick's Institution* [2012] IEHC 517, per Finlay Geoghegan J.

The judgment of the High Court

12. In his judgment Kearns P. accepted that there was a special duty imposed on State bodies to deal expeditiously with criminal prosecutions against children. Kearns P. accepted, however, that the object of the provision was to ensure that the probation reports (and other similar reports from other experts) are available in a timely fashion "so that the child in question does not suffer from any avoidable delays in the sentencing process."

13. Kearns P. held that this does not mean, however, that the time limits prescribed by s. 100 of the 2001 Act are absolute, as it might not be possible for a variety of practical reasons to complete the process within the relevant time period. Imposing such a deadline might risk denying the young offender "the benefits of a more appropriate and more carefully considered and fully informed sentence." If, moreover, it had been intended that the capacity of the sentencing court to impose sentence was to have been ousted by reason of such delay, one would have expected that this would have been expressly stated by the section itself.

The object and purpose of s. 100 of the 2001 Act

14. The first question which naturally arises is what the object of the time limits provided for in s. 100(1) and s. 100(2) of the 2001 Act actually is? The speedy determination of offences involving juveniles is obviously of considerable importance. As Geoghegan J. said in *BF v. Director of Public Prosecutions* [2001] 1 I.R. 656, 666:

"…in the case of a criminal offence alleged to have been committed by a child or young person as in this case, there is a special duty on the State authorities over and above the normal duty of expedition to ensure a speedy trial, having regard to the obvious sensitivities involved."

15. While the Oireachtas undoubtedly had this overall consideration in mind, I agree with Kearns P. that the more specific objective of this section appears to have been to ensure that those charged with the preparation of a report concerning the welfare of the offending child did so in a timely and effective fashion. This is underscored by the provisions of s. 100(3) of the 2001 Act in that it seeks to encourage those responsible for the preparation of such a report to do so at least four working days before the end of the remand period, albeit that no formal obligation ("…shall make all reasonable endeavours …") to this effect has been imposed.

16. It must also be recalled that, by definition, the offending child will already have been found guilty. The court is nonetheless permitted and, in the case where a custodial sentence is contemplated, required, to adjourn sentence pending the preparation of a

report by the third party concerned. There is, however, nothing in s. 100 of the 2001 Act to indicate that the court should somehow ultimately abstain from pronouncing sentence or that it should be precluded from doing so even where these time limits have not been honoured. Here it must be recalled that as Finlay Geoghegan J. held in *Allen*, s. 99(1)(b) of the 2001 Act imposes a mandatory obligation on the sentencing court to adjourn sentence pending receipt of a probation report in those cases where a custodial sentence is considered to be the most appropriate sentence. It would be strange if a subsequent delay on the part of a third party in providing a copy of that report had the effect of precluding the court from imposing sentence. This is especially so when it is borne in mind that it is possible that any such delays have been brought about by the unwillingness of the young offender in question to engage with the probation service or other outside expert responsible for preparing the report requested by the sentencing court.

17. Viewed thus, the obligations contained in s. 100 of the 2001 Act are directed towards the conduct of third parties to the proceedings. It is clear, however, from the case-law that the courts have never treated time limits of this particular kind as being jurisdictional in nature, precisely because this would place the litigants at the mercy of the actions of third parties over which they had no control. Two examples may serve to illustrate this point.

18. In *Prendergast v. Porter* [1961] I.R. 450 Davitt P. was called upon to interpret the provisions of r. 17 of the District Court Rules 1955 which required District Judges to sign a case stated within six months. In the instant case, the case stated had not, in fact, been signed by the District Judge within the six months period, but Davitt P. held that this did not mean that the case stated was somehow invalid ([1961] I.R. 440. 441):

> "It seems to me that possibly the reason behind the new rule was to provide a period after which the Justice could clearly be said to have neglected or refused to perform his duty; and to enable mandamus proceedings then to be instituted. It never could have been the intention to deprive a party of his right of appeal by way of case stated."

19. A similar view was taken by the Supreme Court in *Irish Refining plc v. v. Commissioner of Valuation* [1990] 1 I.R. 568. Section 10 of the Annual Revision of Rateable Property (Ireland) Amendment Act 1860 provided that any of the parties might within three months of a decision of the Circuit Court apply to that Court requiring the judge to state a case for the High Court. The section then required the judge to sign and transmit the case stated to the High Court.

20. In this case one of the respondents had transmitted a case stated to the Circuit Court, but the judge did not actually sign the case stated within the three month period. The applicants subsequently sought an order restraining the Circuit Court judge from transmitting the case stated on the ground of undue delay. The Supreme Court held, however, that the failure of the Circuit Court judge to sign the case stated within the three month period did not render it invalid. As Finlay C.J. stated ([1990] 1 I.R. 568, 577):

> "…if the interpretation contended for on behalf of the applicant were applied to this section, the position of a person seeking a case stated would be that he would be entirely at the mercy of the judge concerned and that for practical purposes it would be impossible for him, under a number of hypothetical circumstances, such as the absence from the country on vacation or the illness of the judge, to prosecute his appeal by way of case stated. Such a manifestly unjust procedure should not, in my view, be assumed to have been the real intention of the legislature and should not be identified as a possible objective of the legislation with which the Court is concerned in this case."

21. Much the same can be said in the present case. If the applicant were correct, it would mean that his sentencing could be placed in jeopardy by reason of events extraneous to the prosecution and entirely outside its control. It could scarcely have been intention of the Oireachtas that, for example, the sudden illness of the member of the probation and welfare service who had the responsibility of preparing the probation report for the young offender in question should have the dramatic effect that the Court would thereby be helplessly deprived of its sentencing jurisdiction simply because this illness meant that the 28 day or (as the case may be) 42 day statutory time limit was perforce thereby exceeded. Many other examples along these lines could also easily be envisaged.

22. The language and structure of s. 100(3) of the 2001 Act also clearly supports this conclusion. The Oireachtas plainly sought to encourage those responsible for preparing the report to do so in a timely fashion so that the judge would have ample time to reflect on the probation report prior to pronouncing sentence and to ensure, in the words of Kearns P., that "the child in question does not suffer unduly from any avoidable delays in the sentencing process.". It could not have been intended that simply because the third party official or expert did not provide the court with the report at least four days before the end of the remand period in the manner envisaged by the section (but which itself is not expressed to be mandatory) that the judge himself or herself was thereby permitted only to sentence the young person within the 28 or 42 day statutory period period (as the case may be) provided by s. 100(1) and s. 100(2) respectively. An example may help to illustrate this point.

23. Let us suppose a probation report in a difficult case finally came to hand on the 42nd day just as the extended remand period was due to expire. It could scarcely have been intended by the Oireachtas that the presiding judge would not have been entitled to take a few days to consider its implications – perhaps having invited further submissions from the parties – before proceeding to pronounce sentence after that 42 day time period had expired.

24. One might equally add that had the Oireachtas intended to bring about a situation where a young offender who had pleaded guilty to serious offences could no longer be sentenced by reason of the delay on the part of the experts who had been requested by the sentencing court to prepare reports which were ultimately designed for the benefit of the offender, one would have expected that this would have been stated with unmistakeable clarity and that this would not arise – as is contended for by the applicant – simply indirectly and by implication from the operation of the section.

25. There is, after all, a presumption that the Oireachtas did not intend to bring about unclear changes in the law. This means that where the Oireachtas envisages a significant change in the law, this should be stated expressly: see *Minister for Industry and Commerce v. Hales* [1967] I.R. 50, 76-77, per Henchy J. There can be no doubt but that a state of affairs where the Circuit Court was deprived of its sentencing jurisdiction in respect of an offender who pleaded guilty would represent a significant change in the law. If this had been intended as a consequence of the failure to honour the s. 100 time limits, one would have expected that this would have been immediately obvious from the scheme of the legislation.

26. None of this is to suggest that the time limits prescribed by s. 100 of the 2001 Act have no real legal force or standing. The time limits imposed thereby are in principle mandatory, so that, for example, it was plain that on the 17th November 2014 the Circuit Court lacked jurisdiction to remand the accused for sentence several months hence to the following 15th February 2015. Indeed, once the matter came to her attention, the Director quite properly did not seek to stand over the making of a remand order of this duration.

Conclusions

27. Nevertheless, the fact that the s. 100 time limits are indeed in principle mandatory is, however, a separate and distinct issue to

that presented in this appeal which is rather what the consequences (if any) of the failure to observe those time limits should be? For the reasons already stated, however, I do not think that it was ever intended or contemplated by the Oireachtas that the Circuit Court would no longer have a jurisdiction to impose sentence simply by reason of a failure to honour these time limits.

28. It follows, therefore, that I consider that the decision of Kearns P. was correct and that the appeal should be dismissed.