Neutral Citation Number: [2010] IEHC 391

THE HIGH COURT

JUDICIAL REVIEW

2009 616 JR

BETWEEN

MARIA MUNTEAN

APPLICANT

AND

DISTRICT COURT JUDGE HAMILL

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice McCarthy delivered on the 11th day of May 2010

1. In this matter leave was given by Peart J. on 15th June, 2009, to seek certain relief with respect to an order of the first named respondent of the 9th June, 2009. What I might describe as the core relief sought by the applicant is an order of *certiorari* bringing up that order before this Court so that it may be quashed, the remaining relief being ancillary to, or following from it. The applicant had been convicted on 20th February, 2009, of an offence concerning theft pursuant to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001. At that juncture s. 99 of the Criminal Justice Act 2006, ("the 2006 Act"), as amended by s. 60 of the Criminal Justice Act 2007 became relevant. For the sake of completeness one might add that it was further amended by the Criminal Justice (Miscellaneous Provisions) Act 2009 but that amendment is not material to this matter, having regard to the date upon which it became effective.

2. The 2006 Act addresses a situation where at the time of the conviction ("the second conviction") there is in force a sentence which had been previously suspended in another court on an earlier conviction, ("the first conviction").

3. On the occasion of the second conviction the trial judge must remand the accused to the court which imposed the suspended sentence on the first conviction, before proceeding to sentence and as contemplated by s. 99(9) of that Act which provides as follows:-

> "Where a person to whom an order under subsection (1) applies is, during the period of suspension of the sentence concerned, convicted of an offence, the court before which proceedings for the offence are brought, shall, before imposing sentence for that offence, remand the person in custody or on bail to the next sitting of the court that made the said order."

The first named respondent remanded the applicant on bail to the next sitting of the court of first conviction and in particular to 4th March, 2009. At the same time he remanded the applicant for sentence before him in respect of the (second) conviction which he had rendered to the 30th March, 2009. The purpose of the remand to the court of first conviction is to permit the judge who rendered it to revisit the question of the suspension.

4. On 27th February, 2009, a notice of application to state a case against the second conviction was lodged on behalf of the applicant with the first named respondent, purportedly pursuant to the provisions of s. 2 of the Summary Jurisdiction Act 1857 as extended and amended by s. 51 of the Courts (Supplemental Provisions) Act 1961. The first named respondent refused to state a case on the basis that he had no jurisdiction to do so until after sentence, which had, of course, been adjourned pending the disposition of the issue of the suspended sentence in respect of the first conviction. This matter has accordingly resolved itself into an issue of whether or not the first named respondent could have, or should have, stated a case by way of appeal. No one doubts that unless an application for the statement of a case is frivolous the District Court must do so and no one doubts either but that there is an absolute right of appeal by way of rehearing on oral evidence to the Circuit Court.

5. I must accordingly decide whether or not one may appeal by case stated against a conviction only, when sentence has been adjourned or postponed, as required by law, as in the present case. Of course if one cannot appeal a conviction alone, and sentence on the second conviction has been adjourned pending disposition of the first, it may follow that a suspension might be discharged with the requirement to serve a custodial sentence, in circumstances where a party might successfully appeal his second conviction. One might serve a term of imprisonment where it might ultimately be held there was no basis for bringing the suspension to an end. This would constitute a significant dilution of the benefit accruing to a party appealing from the District Court, namely, the benefit of remaining at liberty. Such an appellant has effectively been held to be in the position of someone enjoying the presumption of innocence, notwithstanding the summary conviction, though, of course, the fact of a conviction might be relevant in adjudicating on whether or not continuing bail ought to be afforded.

6. This issue must be considered by reference to the provisions of statute in respect of cases stated and the relevant rules of the District Court. There is no reason to suppose that interpretation of these provisions has been affected by the 2006 Act. The Oireachtas was no doubt cognisant of the law as to appeals prior to the Act and on the plain and ordinary meaning of its provisions they do not impinge in any way upon those pertaining to appeals of either kind. Accordingly, one must consider whether or not, on the basis of the provisions pertaining to cases stated, unamended as they are, one may appeal a conviction before sentence.

7. No one doubts but that a trial is not concluded until sentence has taken place and that no appeal lies nor can leave be given for appeal from a conviction on indictment until after sentence. The rule of law that a trial has concluded only after sentence has not

been explicitly considered in the context of summary offences, but the consequence, of course, of acceptance of the applicant's position is that summary offences lie on a different footing to convictions on indictment.

8. Pursuant to s. 2 of the Summary Jurisdiction Act 1857 an appeal by way of case stated may be taken:-

> "After the Hearing and Determination… of any Information or Complaint which he or they have a Power to determine in a summary Way…"

9. Pursuant to the provisions of s. 51(1) of the Courts (Supplemental Provisions) Act 1961 that entitlement was extended so as to enable:-

> "any party to any proceedings whatsoever heard and determined by a justice of the District Court (other than proceedings relating to an indictable offence which was not dealt with summarily by the court) if dissatisfied with such determination as being erroneous on a point of law to apply…for the opinion thereon of the High Court."

It will be seen that the jurisdiction was extended by the latter Act in the sense that cases might be stated not merely from determinations of informations or complaints but to "any proceedings". In either case, however, the matter must be "heard and determined" and the appeal lies from the "determination".

10. I have been referred by counsel for the second named respondent to both Murdoch's *Dictionary of Irish Law* (4th Ed) and Black's *Law Dictionary* (9th Ed). I also consulted the Oxford English Dictionary (10th Ed., revised) as to the meaning of these terms. In Murdoch, the word "determine" is defined as follows:-

> "to come to an end or to bring to an end."

In the same work one is referred to "decision" under the word "determination" and the former is defined as:-

> "the action of deciding (a contest, controversy, question etc)…"

(Reference is made also, there, to appeals to the Supreme Court pursuant to the Constitution but I do not think that reference is relevant in the present case).

11. In the 4th edition of Black, (I do not have the ninth available to me), "determination" is defined as:-

> "a final decision by a court or administrative agency…"

The word "determine" is merely referred to under the heading "determination", as a relevant verb. "decision", is defined *inter alia* as:-

> "a judicial or agency determination after consideration of the facts and the law; esp., a ruling, order or judgment pronounced by a court when considering or disposing of a case."

A distinction is made between an "appealable decision" and, *inter alia*, a "final decision" which, to an extent, complicates the issue in as much as that is defined as:-

> "a decree or order that is sufficiently final to receive appellate review (such as an order granting summary judgment), or an interlocutory decree or order that is immediately appealable…"

It is immediately evident, however, that the examples given are in quite a different category from the class of order under consideration here.

12. I am assisted also by the edition referred to in the Oxford English Dictionary where, under the heading "decision" the following appears:-

> "1. a conclusion or resolution reached after consideration… the action or process of deciding.
>
> 2. the quality of being decisive; resoluteness."

"Determination" is *inter alia* defined as:-

> "the settlement of a dispute by the authoritative decision of a judge or arbitrator."

and "determine" (explicitly in the context of the law) is defined as:-

> "bring or come to an end."

13. It seems to me, on the basis of these definitions, that the quality which the words "determine", "determined" or "determination" have is one importing of finality and that the terms used in both Murdoch and the Oxford English Dictionary (which are substantially the same), namely, "to come on end, or to bring to an end" and "bring or come to end" encapsulate the concept. Obviously no proceeding, information or complaint can be said to have been brought to an end and/or come to end until sentence (i.e. after the end of the trial). This is the plain and ordinary meaning of the words in question: I cannot import words into these provisions by reason of the 2006 Act. Thus, there is no jurisdiction to state a case after conviction only.

14. For the purpose of advancing his proposition as to the jurisdiction to state a case, counsel for the applicant submitted that an accused may appeal to the Circuit Court against conviction prior to sentence. By analogy, Mr. O'Higgins submitted that if there was an absolute right of appeal to the Circuit Court following conviction but before sentence (and notwithstanding different forms of words as between the statutes pertaining to cases stated and those pertaining to appeals to the Circuit Court) the same rule applied to cases stated. The Circuit Court has jurisdiction to hear appeals from the District Court only if and in so far as jurisdiction is conferred by statute. The relevant provision is s. 18(1) of the Courts of Justice Act 1928 which is to the following effect:-

> "An appeal shall lie in criminal cases from a Justice of the District Court against any order (not being merely an order returning for trial or binding to the peace or good behaviour or to both the peace and good behaviour) for the payment of

> a penal or other sum or for the doing of anything at any expense or for the estreating of any recognizance or for the undergoing of any term of imprisonment by the person against whom the order shall have been made."

As will be seen from this provision, for the purpose of brevity in the present context, an appeal can be taken only after sentence and, by definition, accordingly only after the matter is completely concluded, and not merely after conviction even if, sentence happens to be adjourned following conviction, for whatever reason.

15. This section was considered in the *State (Aherne) v. Cotter* [1982] 1 I.R. 188. There, and relying upon the form of a notice of appeal prescribed by the Rules of the District Court, the prosecutor purported to appeal against conviction only. On the hearing of the appeal the learned Circuit Court Judge increased the sentence of imprisonment imposed in the District Court. Whilst the 1928 Act was not amended thereby, the Supreme Court found it necessary, in dealing with the statutory jurisdiction to appeal, to consider s. 50 of the Courts (Supplemental) Provisions Act 1961 which as quoted by Walsh J. at p. 195, and provides that:-

> "…when an appeal is taken against an order in a criminal case made by a Justice of a District Court convicting a person and sentencing him to undergo a term of imprisonment and either
>
> (i) the notice of appeal states that the appeal is against so much only of the order as relates to the sentence or
>
> (ii) the appellant, on the hearing of the appeal, indicates that he desires to appeal against so much only of the order as relates to the sentence, then, notwithstanding any rule of law, the Circuit Court shall not, on the hearing of the appeal, re-hear the case except to such extent as shall be necessary to enable the court to adjudicate on the question of sentence."

He also said at pp. 195-196 that:-

> "At first sight that would appear to indicate that the "rule of law" in existence at the time when that Act was passed was to the effect that an appeal from a District Court conviction in a summary matter was, by its nature, an appeal against both conviction and sentence and that it was not possible to limit the appeal to one or other of these results."

16. Walsh J. pointed out that in *Ex-parte M'Fadden* (Judgments of the Superior Courts in Ireland 1903, ed. p. 168) Palles C.B., held that on appeal to Quarter Sessions (being an appeal analogous to an appeal to the Circuit Court) there was no limitation on the powers of that court, the appeal being a new trial in every sense of the word, that is to say:-

> "… [by virtue of the relevant statutory provision]… in the result both conviction and sentence were open to review depending on the outcome of the retrial."

And, accordingly Walsh J. said at pp. 196-197 that this was:-

> "… the view of the Oireactas when it passed the Courts (Supplemental Provisions) Act, 1961, and made special provision for the possibility of appealing against sentence as distinct from conviction. It did not make any such provision for an appeal against conviction solely. Section 18 of the Act of 1928 extended the right of appeal to all cases where any fine or any imprisonment was imposed, but it made no provision for appealing against conviction alone or penalty alone."

Later, also at p. 197 (in addressing the Rules of the District Court) he said:-

> "The right of appeal is determined by statute and, if the statute does not permit an appeal against conviction separately, the … Rules of the District Court cannot purport to do otherwise."

17. Whilst the judgment of Henchy J. dealt primarily with the procedural aspects of the application before the Supreme Court, he said, at p. 206, in relation to separate appeals pertaining to conviction and sentence:-

> "… I could not subscribe to the conclusion that an appellant from an order made by the District Court in a criminal case may confine his appeal to the Circuit Court to the question of guilt, to the exclusion of the question of sentence".

And, later-

> "… if the correlative right to confine an appeal to the question of conviction was intended to operate, s. 50 of the Act of 1961 would not have remained silent on the point. At the very least, it would not have given an appellant the right to limit his appeal to the question of sentence subject to the express proviso that such limitation was to be "notwithstanding any rule of law". In other words, s. 50 of the Act of 1961 is to be read as encompassing no more than a special exception to the general rule that an appeal from the District Court to the Circuit Court is to be a re-hearing *de novo* on which all issues, of law and fact are open."

18. Thus, one cannot limit one's appeal, (subject to the provisions of s. 50 of the 1961 Act), to an appeal against conviction only

For the purpose of completeness I might refer to the submission (as put in writing and as elaborated upon orally):-

> "… that any procedure or interpretation of the law that prevents the applicant from exercising a legitimate appeal against the potential trigger for the activation of a suspended sentence to have a stay put on the operation of that potential trigger until the determination of the appeal, fails to vindicate the applicant's constitutional rights and runs contrary to natural justice."

In effect, this is a submission that an alternative interpretation to that which I have given to the statutory provisions pertaining to appeals is open and should be preferred since mine does not either vindicate the constitutional rights of an accused or is contrary to natural justice. To me, there is no room for any such alternative. I do not suggest, of course, that there is any such failure or want of natural justice in any event, on my interpretation.

19. Two decisions have been brought to my attention as authority for the proposition that appeals against conviction only are lawful. The first of these is *Burke v. The People (The Director of Public Prosecutions) and Judge McNulty* [2007] 2 I.L.R.M. 371. In that case, after conviction but before sentence, it was indicated on behalf of the accused that he wished to appeal and the learned District Court Judge was asked to proceed to sentence, in circumstances where he had adjourned it, remanding the accused in custody

(where the accused had apparently been on bail until conviction). It seems to be right to infer that the application to proceed to sentence on the date of the conviction was on the basis of the conception that an appeal could be taken only after conclusion of the matter by sentence. In this Court, however, it appears that a different view was advanced as it was held by Charleton J. that an appeal might be taken after conviction only. The provisions of s. 18 of the 1928 Act or of the decision of the Supreme Court, were not brought to the attention of my colleague and I am sure he would have taken a different view if they had.

20. The second was *Harvey v. Judge Leonard and The People (The Director of Public Prosecutions)* [2008] IEHC 209. There, the ultimate issue was whether or not the District Court had jurisdiction to adjourn sentence so that another court, which, prior to conviction, had imposed a suspended sentence, could consider whether or not the suspension might be removed. Apart from the statutory provisions pertaining to adjournment of sentence in the context of a prior suspended sentence, it was submitted that separation of a conviction from sentence occasioned by an adjournment to another court unlawfully severed conviction and sentence in the light of the well-established rule that severance was not possible, as in the case of the issue of orders of *certiorari* quashing a sentence imposed by an inferior court.

21. Hedigan J. held that there was no true severance but merely what I might term a divorce in point of time between conviction and sentence. Whilst it was not essential to his decision, Hedigan J. relied upon the view of Charleton J. in *Burke* in support of the conclusion that conviction and sentence were not so "inextricably linked that nothing of substance can occur between them".

22. Again, I have no doubt but that if the relevant statutory provision and Aherne were brought to the attention of Hedigan J. he would not have relied upon the view expressed by Charleton J. In light of the view I have taken of Charleton J.'s decision, not to mention these omissions, I do not think it is appropriate to follow or apply Hedigan J.'s decision either.

23. With respect to the argument advanced on behalf of the applicant that there was no jurisdiction in the District Court to remand her to the court of first conviction due to the lodgement and service of the application to state a case by virtue of the fact that such application will, once an appropriate recognizance is entered into, operate as a stay, I think that this must also fail. Since no appeal lies before sentence, by definition, a stay cannot operate by virtue of a purported application which a court has no jurisdiction to entertain.

24. Thus learned District Court Judge had jurisdiction to remand the applicant pursuant to s. 99 of the 2006 Act and indeed, a duty to do so.

25. I therefore refuse the relief sought.