Neutral Citation [2015] IEHC 515

THE HIGH COURT
JUDICIAL REVIEW

[2014 No. 352 J.R.]

BETWEEN

PHILIP CROAKE

APPLICANT

AND

DISTRICT JUDGE MICHAEL COUGHLAN AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered the 30th day of July, 2015.

Introduction

1. In the within proceedings, the primary relief sought by the applicant is an order of *certiorari* quashing the order of the first named respondent ("the District Judge") of the 22nd May, 2014, whereby he fixed recognizances for the purposes of an appeal to the Circuit Court against the applicant's conviction and sentence. Various ancillary reliefs are also sought.

Background Facts

2. The applicant appeared before the District Court on the 22nd May, 2014 charged with a single offence of being in possession of a knife which had a blade or which was sharply pointed, contrary to s. 9(1) and (7) of the Firearms and Offensive Weapons Act 1990, as amended by s. 39 of the Criminal Justice (Miscellaneous Provisions) Act 2009.

3. The trial of the applicant on the above charge proceeded before the District Judge on the 22nd May, 2014. The applicant pleaded not guilty and was represented by counsel. The applicant was convicted and evidence in mitigation was lead that the applicant was unemployed and had three previous convictions for minor road traffic offences. Thereafter, the court imposed a 12 month probation bond and discharged the applicant conditionally on entering a recognizance in his own bond of €300 to be of good behaviour for a period of 12 months and to be subject to the supervision of the Probation and Welfare Service during that period.

4. Thereafter, the applicant, through his counsel, indicated to the court that he wished to appeal to the Circuit Court and to have recognizances fixed for that purpose. The District Judge fixed recognizances in the amount of €500 in the applicant's own bond with nothing to be lodged together with an independent surety of €500 with nothing to be lodged. Counsel for the applicant questioned the requirement for an independent surety but the District Judge refused to vary the order saying that he wanted to ensure that the appeal was genuine.

5. A notice of appeal was subsequently served by the applicant on the 11th June, 2014, outside the time limited in that behalf by the District Court Rules, an extension of time having been obtained for that purpose.

6. The appeal appeared in the Circuit Court list for the first time on the 22nd July, 2014. It appears to be common case that had the appeal proceeded, it would have been allocated a hearing date within about six months of it first appearing in the list so that in the absence of the within judicial review proceedings, the appeal would now be disposed of.

The Probation of Offenders Act 1907

7. Section 1(1) of the above Act provides as follows:-

> "1.—(1) Where any person is charged before a court of summary jurisdiction with an offence punishable by such court, and the court thinks that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, without proceeding to conviction, make an order either—
>
> (i) dismissing the information or charge; or
>
> (ii) discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for conviction and sentence when called on at any time during such period, not exceeding three years, as may be specified in the order."

8. Accordingly, the effect of the order made by the District Judge in this case is that there is no conviction recorded against the applicant nor is it suggested that he has not been of good behaviour since the 22nd May, 2014.

The District Court Rules

9. Order 101, rule 4 of the District Court Rules, 1997 (S.I. No. 93 of 1997) as substituted by Art. 9 of the District Court (Criminal Justice Act 2007) Rules 2008 (S.I. No. 41 of 2008) provides as follows:-

> "4. Subject to the provisions of Order 12, rule 20, where a person is desirous of appealing in criminal proceedings or in a case of an order for committal to prison under the Enforcement of Court Orders Acts 1926 and 1940, a recognizance for the purpose of appeal shall be fixed by the Court. The amount (if any) of the recognizance in which the appellant and the surety or sureties, if any, are to be bound shall be fixed by the Court and where an amount is so fixed, it shall be of such reasonable amount as the Court shall see fit. An application to the Court to fix the amount of a recognizance may be made ex parte. A sum of money equivalent to the amount (if any) conditioned by the recognizance may be accepted in lieu of a surety or sureties. The recognizance shall be in accordance with the Form 18.4, Schedule B, and shall be entered into within the fourteen day period fixed by rule 1 of this Order."

10. The 14 day period referred to commences on the date on which the decision under appeal was given.

11. Order 101, rule 6 of the District Court Rules 1997, as substituted by Art. 3(a) of the District Court (Appeals to the Circuit Court) Rules 2005 (S.I. No. 80 of 2005) provides as follows:-

> "6. On the entering into of a recognizance in accordance with rule 4 of this Order, execution of the Order appealed against shall be stayed and the appellant, if in custody, shall be released. In any case where a monetary penalty has been imposed on the appellant or the appellant has been required to perform a condition, the court may, not later than six

months from the expiration of the time allowed by the Order or payment of the penalty, or for performance of the condition, issue the warrant of committal in default of such payment, or in default of such performance, as the case may be, unless the appellant shall have entered into a recognizance."

The Arguments

12. The essence of the applicant's argument is that the District Judge fixed the amount of the recognizance at a level which could not be met by the applicant and was thus unreasonable and made without jurisdiction under Order 101, rule 4. Equally, the requirement for an independent surety was unreasonable in circumstances where the applicant knows no one who would be in a position to act as a suitable surety. Further, the applicant submits that the reason given by the District Judge for fixing the recognizances at the level he did was not a valid reason because there was no evidential basis for coming to the conclusion that the applicant did not have a genuine reason to appeal.

13. The District Judge made an error of law by creating an unnecessary and disproportionately high barrier to the applicant's absolute right of appeal and his right to a stay on the penalty pending appeal. The applicant relied on a number of authorities on the setting of bail conditions including *McDonagh v. Governor of Cloverhill Prison* [2005] 1 I.R. 394, *Broderick v. DPP* [2006] 1 I.R. 629 and *Burke v. DPP & Anor* [2007] IEHC 121. The applicant also cited *Moore v. Judge Martin* [2000] IEHC 52 as authority for the proposition that the existence of an appeal was no bar to certiorari where there was a clear error of jurisdiction.

14. Counsel for the respondent submitted that the issue raised by the applicant in these proceedings is in fact moot in circumstances where, but for these proceedings, the applicant's appeal could already have been determined with no prejudice to the applicant. The fixing of recognizances did not prevent him from prosecuting his appeal and their enforcement would only fall to be considered in the circumstances where the applicant failed to prosecute his own appeal, a circumstance which he protests will not arise. It was suggested that there is nothing excessive or disproportionate about the terms of the recognizances but if it could be said that there was, this was an error within jurisdiction which could in any event be rectified by the availability of an appeal to the High Court against the terms set by the District Judge. The reality of the case is that the applicant was not prejudiced in any way in relation to his appeal by the fixing of the recognizances.

15. It was argued that the consideration by the District Judge of whether the appeal was genuine or not was an entirely legitimate consideration for the purposes of fixing recognizances. The existence of an alternative remedy meant that the court ought to exercise its discretion against granting judicial review.

Discussion

16. The essential thrust of the applicant's complaint is that the recognizances were set at a level which was unreasonable. However, the applicant does not seek to suggest what might have been reasonable and thus within jurisdiction. To take an example, if one were to assume that a bond in the sum of €100 with no lodgement was reasonable and thus within jurisdiction, at what point on the sliding scale between €100 and €500 does the level become unreasonable and thus, on the applicant's case, made without jurisdiction?

17. In this regard, it seems to me, that the words of Lord O'Brien LCJ in *The King (Martin) v. Mahony* [1910] 2 I.R. 695 (at pp. 706-707) are apposite:-

> "Indeed, it is admitted that the magistrate has jurisdiction to acquit, but it is said he had no jurisdiction to convict; that he was not within jurisdiction in convicting by reason of the failure of evidence; that is to say, that jurisdiction at a given moment was a one sided thing, a sort of lop-sided power. This, in my opinion, is plainly wrong. It confounds want of jurisdiction with error in the exercise of it. Once it is obvious, and it is so here *ex hypothesi*, that the *charge* as stated is properly, adequately, stated, and within jurisdiction, one cannot but further accept in such cases, such matters, as I have excluded from discussion as not being involved in the present controversy. To grant *certiorari* merely on the ground of *want of jurisdiction*, because there was no evidence to warrant a conviction, confounds, as I have said, want of jurisdiction with error in the exercise of it. The contention that mere want of evidence to authorise a conviction creates a cesser of jurisdiction, involves, in my opinion, the unsustainable proposition that a magistrate has, in the case I put, jurisdiction only to go right; and that, though he had jurisdiction to enter upon an inquiry, mere miscarriage in drawing an unwarrantable conclusion from the evidence, such as it was, makes the magistrate act without and in excess of jurisdiction."

18. The logic of the Lord Chief Justice in this passage appears to me to compelling and equally applicable to the facts of this case. Thus, I cannot see how it could be said that the District Judge had jurisdiction to fix the bond at, say, €200 but deprived himself of that jurisdiction by setting it at, say, €300. It seems to me that if that is an error at all, it must be one within jurisdiction.

19. I think similar considerations apply to the reason given by the District Judge. Having said that, I cannot see that the reason given was in fact necessarily one that was in any sense irrational or unreasonable. The purpose of fixing recognizances at all in the first place must surely be to discourage spurious appeals and incentivise appellants to prosecute their appeal. In that sense, it seems to me that the reason given by the District Judge was little more than stating an obvious and inherently legitimate consideration in relation to the bringing of an appeal.

20. Further, the fixing of the recognizances did not of itself create any barrier to an appeal proceeding. It merely had the effect that there was no stay on the probation order. However, the absence of such a stay was in reality, of little moment in circumstances where no breach of the terms has been alleged.

21. The applicant seeks to suggest that his engagement with the probation service rendered it necessary for him to accept his guilt in circumstances where he vehemently protested his innocence. The applicant suggests that this was a source of potential prejudice but the fact remains that there was no actual prejudice. Had the applicant not brought these judicial review proceedings, his appeal would long since have been determined without any of the alleged apprehended prejudice materialising.

22. Furthermore, the availability of an entirely appropriate alternative remedy in the form of an appeal against the terms of the recognizances to the High Court is in my view something that goes to the discretion of the court in considering whether to grant or refuse relief by way of judicial review. However as I have said, I do not think that the question of discretion even arises in circumstances where the applicant has failed to demonstrate any error of law on the part of the District Judge that warrants the intervention of this court.

23. It also appears to me that the mootness of the issues raised in the light of the factors discussed above would in any event

militate against the court exercising its discretion in favour of the applicant.

24. For these reasons therefore, I will dismiss this application.