Neutral Citation [2012] IEHC 498

THE HIGH COURT

Record Number: 2011 No. 1069 JR

Between:

Monalisa Brehuta

Applicant

And

District Judge John Coughlan and The Director of Public Prosecutions

Respondents

Judgment of Mr Justice Michael Peart delivered on the 29th day of November 2012:

1. On the 17th October 2011 the applicant was before the District Court at Blanchardstown where she had been charged with an offence of deception contrary to Section 6 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. The offence consisted of changing the price tag on a pair of sunglasses priced at €34.99 which were on sale at TK Maxx, and replacing it with another price tag showing a price of €16.99. She was in that retail outlet with two companions ("AB" and "RD") who were each also engaged upon a similar deception. All three were arrested and charged with an offence under Section 6 of the Act of 2001, and all were before the District Court on the 17th October 2011 and were legally represented. None had any previous convictions and all pleaded guilty.

2. According to the grounding affidavit sworn in these proceedings by Mairead White, solicitor, the first named respondent heard a plea in mitigation on behalf of AB, who had no previous convictions, was not working and was not in receipt of social welfare benefit, and having heard that plea dismissed the charge pursuant to s. 1 (1) of the Probation of Offenders Act, 1907 ("the Probation Act").

3. According to the same affidavit, the District Judge heard a plea in mitigation on behalf of the applicant, who also had no previous convictions, but was working and earning c. €350 per week. Having heard that plea, the first named respondent convicted the applicant and imposed a fine in the sum of €500 and gave her five months in which to pay that fine. It appears that at that point a submission was made to the first named respondent that the only distinction between the two offenders was that the applicant was working, and that it appeared therefore that she was being penalised for working, given that AB had been given the benefit of the Probation Act. That submission was rejected and he declined to vary his order.

4. Again, according to the grounding affidavit, a plea in mitigation was given on behalf of DR to the effect that he was working and earning a sum of c. €200 per week as a delivery driver. The first named respondent duly convicted him and imposed a fine of €500 with five months to pay. A similar submission was made as was made in the case of the applicant, but to no avail. It then appears that DR gave further instructions to his solicitor and informed her that he was by the date of the trial no longer working. That information was conveyed to the first named respondent who, having asked her to confirm those instructions, vacated his previous order and dismissed the charge under the Probation Act.

5. At that juncture, a further submission was made on behalf of the applicant to the effect that where three persons were before the Court facing three similar charges arising from basically the same incident, it was unfair to penalise one, the applicant, with a conviction where the only distinction between her and her two accomplices was that she was working and they were not. The first named respondent, according to the grounding affidavit, indicated that he considered that he was being fair and was taking the means of the respective offenders into consideration.

6. I should add at this point that a replying affidavit has been sworn by Garda Laura Kelly who was dealing with these matters at Blanchardstown District Court on the 17th October 2012, and she does not take issue with any of the facts as deposed to by Ms. White as to how matters proceeded, except that she adds her view that the first named respondent considered the circumstances of each defendant separately and had regard to their means, and she further states that she was not called upon to give evidence.

7. The Statement of Grounds seeks to have the applicant's conviction and fine quashed, and seeks also a declaration that "similarly situated persons who come before the criminal courts on the same charge should be treated in the same manner".

8. Those reliefs are sought on the grounds that the first named respondent erred in law and acted contrary to natural justice and fair procedures in applying a markedly different sentencing regime to the applicant in contrast to her two co-accused and without any material reason for so doing. It is also pleaded that the applicant has in effect been unjustly penalised for the fact that she was working. It is pleaded also that that what has occurred breaches the constitutional guarantee to a fair trial, the right to equality, the right to earn a livelihood, as well as similar rights under the European Convention on Human Rights and Fundamental Freedoms. The applicant submits that the decision of the first named respondent is neither proportionate nor rational and is therefore unlawful.

9. The respondents' Statement of Opposition commences with the assertion that the applicant is not entitled to challenge the impugned order, because any grievance she may have can be addressed by way of appeal to the Circuit Court which is invested all necessary powers in regard to sentencing. Notwithstanding that plea, the respondents plead that the sentence is not unreasonable within the meaning to be attributed to that word under Irish law, and that it is neither disproportionate nor unfair. They submit that a District Judge is not only permitted, but is required, to have regard to the means of an offender when deciding upon the amount of a fine. It is denied also that any of the alleged breaches of rights have occurred as pleaded by the applicant in her Statement of Grounds.

10. It is important to say at the outset that this application does not in any way speak to whether or not AB and RD were treated unduly leniently, or even whether or not it was appropriate in all the circumstances to give them the benefit of the Probation Act. The issue is really whether, in circumstances where AB and RD have been dealt with in a way which avoids even a conviction being recorded against them, and on the sole stated basis that they were not working, the first named respondent was required by law to dispose of the charge against the applicant in the same manner, given that the offences of all were essentially the same, and none had a previous conviction. Or, as it is put by the applicant, was she unfairly and unlawfully discriminated against by reason only of the

fact that she was working?

11. That the issue reduces to this is clear if one forgets for the moment that there were three persons before the Court on similar but different charges, and supposes for the moment that the applicant alone had been charged with an offence, pleaded guilty, and thereafter the District Judge was informed that she had no previous convictions, and was working and earning €350 per week. In such circumstances it would be difficult to argue that the District Judge acted unlawfully in imposing a fine of €500 instead of giving the applicant the benefit of the Probation Act, even if he may have had a discretion in that regard. She might well consider an appeal against the amount of the fine given the level of earnings, and the nature of the offence, but that is another matter.

12. Thus, the only basis for contending that the first named respondent acted unlawfully in the present case is that he failed to treat persons in a similar position in a similar manner. Counsel has referred to the judgment of Henchy J. in *McMahon v. Leahy* [1984] I.R. 525, and to reference made to that judgment by McKechnie J. his judgment in *DPP v. Duffy* [2009] 3 I.R. 613. That case arose from unlawful price-fixing by a cartel. Two persons who were dealt with in the Circuit Criminal Court received suspended sentences and a fine. However, Duffy was dealt with in the Central Criminal Court following the enactment of the Competition Act, 2002. McKechnie J. took account of the fact that Duffy's two co-accused had received suspended sentences, and while he considered that to be overly lenient and would have dealt with them differently if he had been dealing with those cases, he nevertheless felt bound to suspend the sentence for Duffy given the manner in which the co-accused had been dealt with, and even though he considered such a punishment to be unduly lenient. In so concluding, he stated the following:

> *"In McMahon v. Leahy [1984] JR. 525, Henchy J, giving one of two judgments in the Supreme Court, dealt with this point in the context of Article 40.1 of the Constitution. In summary he held that persons coming before the court who cannot be differentiated on the basis of relevant criteria should, broadly speaking, be treated equally: " ... like persons must be treated alike by the law ... " (ibid. at p. 541). Unless justified, there should be no inequality of treatment. It seems to be that whilst a distinction can be made between the earlier cases and this one, it is not such as would justify that degree of variation which the serving of a prison sentence would demand. "*

13. The written submissions helpfully provided and spoken to by Micheal P. O'Higgins S.C. on behalf of the applicant, state that the applicant's central argument is that "*entering a conviction against a person, and applying a markedly different sentencing regime as a result, purely on account of the fact that the person is working, is unreasonable and irrational and contrary to common sense*". It is submitted also that by dealing with the applicant as he did, the first named respondent has treated "*what is a societal good as a societal bad"*, and that the applicant is being punished for her diligence. It is argued also that the decision is contrary to public policy because it encourages offenders to give up their employment before the trial date so that their chances of getting the benefit of the Probation Act would be improved.

14. However, the main issue relates not so much to the amount of the fine or that she was given a fine as such compared to her co-accused, but rather that she was convicted at all. At first blush this is a difficult argument given that the applicant pleaded guilty to the offence. But the applicant emphasises that the difference in treatment between her and her two co-accused is that even though all pleaded guilty to almost identical offences and none had any previous convictions, the applicant alone was convicted. Even though the other two co-accused had pleaded guilty their charges were dismissed, and apparently on the sole basis that they were not working whereas the applicant was.

15. If one looks only at the fact that a fine was imposed on the applicant because she was working, it seems clear to me that in so far s the first named respondent took into account the financial means of the various parties, it was not unlawful to impose a fine on the applicant and to impose no fine on the other two accused. One might consider that some fine might have been imposed upon the two unwaged accused, even if in a fairly nominal amount, but clearly it would be within the discretion of the first named respondent to impose no fine. It seems to me that taking into consideration the means of the three offenders should speak to the amount of the respective fine to be imposed, but should not be taken into account in deciding whether a person should be convicted or not. Each had pleaded guilty to almost identical offences. Only the applicant has a criminal record following the decision of the first named respondent, and this is something which will remain on the applicant's record. That is the inequality argued for, and submitted to be an unlawful treatment of the applicant compared to her co-accused colleagues, and is said to be a disproportionate difference in treatment of persons similarly situated.

16. The applicant has argued that the applicant is in effect being penalised for working, and that this is unreasonable and irrational. I do not think that argument is a good one. Whatever way one looks at it, the applicant is being punished because she committed the offence for which she pleaded guilty. She is not being punished because she is working. Other arguments apart, the first named respondent was required when deciding on the amount of any fine to be imposed to take into account her ability to pay and to impose a fine that took into account her financial means. He stated that he had taken into account her means. There is nothing irrational or unreasonable in his decision to impose a fine, even one of €500, given the range of punishments available to him under the Act of 2001 for such an offence of deception.

17. Tom O'Malley BL for the respondent argues that the applicant's grievance relates only to sentence and as such her remedy is to appeal that sentence to the Circuit Court. But he makes the point also that having informed himself of the applicant's circumstances, he was entitled to impose the fine which he imposed, and in so doing acted within jurisdiction and within his discretion.

18. As to the respondent's argument that the decision of the first named respondent should more properly be the subject of an appeal to the Circuit Court and not the subject of judicial review, I do not think that is correct. This case is not really just about the sentence imposed. If it was, there might be an argument that a sentence should not normally be the subject of judicial review at all, except in the case of an extreme sentence which flies in the face of fundamental reason and common sense. That feature is certainly absent in relation to the fine of €500 imposed in this case.

19. But there are other reasons why an appeal would not provide an effective remedy for the applicant, given that the nature of the applicant's complaint. First of all, in view of the plea of guilty offered in the District Court, any appeal could only be in respect of the severity of the fine, and that misses the point as far as the applicant is concerned, since it is the fact that she received a conviction at all, as opposed to the benefit of the Probation Act which is at the heart of her case. There is also the fact that in any appeal to the Circuit Court she would be there on her own and not as one of three accused. Where the argument being put forward by the applicant is one that she was unfairly treated or treated unequally compared to her co-accused and on the sole basis that she was working whereas the other two were not, I feel that the applicant is entitled to make those arguments by way of judicial review proceedings, since judicial review is the only remedy open to her which could result in the quashing of the order, thereby, albeit by a different route, achieving a situation whereby all three offenders receive equal treatment before the law by none having a conviction recorded against them for essentially the same or very similar offences.

20. Mr O'Malley has argued that this Court should be reluctant to find itself being asked to act as an appeal court in respect of the merits of the decision to convict and fine the applicant, and must be careful to confine its purview to the process by which the first named respondent's decision was arrived at, and in that regard has referred to certain comments by Hedigan J. in *Balaz v. Kennedy* [2009] IESC 110. For the reasons already stated, I am satisfied that the applicant is entitled to challenge the decision to the decision herein by way of judicial review, given the grounds on which she seeks to do so.

21. In relation to the equality of treatment arguments made by the applicant, Mr O'Malley has submitted that the fact that one or more co-accused have been dealt with more leniently does not require that the applicant be given a sentence that is less than an appropriate one. He of course considers that a fine of €500 was appropriate in the circumstances of the applicant as outlined to the first named respondent. In support, he has referred to the judgment of Walsh J. in *People (Attorney General) v. Poyning* [1972] I.R. 402, where the learned judge giving the judgment of the Court of Criminal Appeal stated:

> *"When two [accused} have been jointly indicted and convicted and one of them receives a light sentence, or none at all, it does not follow that a severe sentence on the other must be unjust. If in any particular case one of such joint accused has received too short a sentence, that is not per se a ground on which this Court would necessarily interfere with the longer sentence passed on the other. Of course, in any particular case the Court must examine the disparity in sentences where, if all other things are equal, the sentences should be the same; it must examine whether the differentiation in treatment is justified The Court, in considering the principles which should inform a judge's mind when imposing sentence and having regard to the differences in the characters and antecedents of the convicted persons, will seek to discover whether the discrimination was based on those differences. "*

22. Mr O'Malley has referred also to the judgment of McKechnie J. in *People (DPP) v. Daly* [2011] IECCA 104 where he looked at the provenance and rationale for the parity rule, as he described it. Having referred to a number of authorities, including from other jurisdictions, McKechnie J. stated at paras.73 and 74 of his judgment:

> *"73. In this court's view, it is important to remember that the parity rule is not a rule of law which requires co-accused be given the same sentence, even if no distinction can be established between them. This principle was established in Lowe and has not been doubted since. Parity, when in play, is a factor which must be considered by the court, as many others must also be. Where possible, equality should be achieved but not regardless of principle or context. It is wrong to think that it is more important that sentences should be proportionate to one another than that they should be proportionate to guilt (R v. Robson and East [1970] Crim. L.R. 354 at 355). It must be recognised that the rule is not omnipotent and that it cannot be utilised to distort other fundamental principles of sentencing. Those principles include judicial discretion, which is the lynchpin of that part of the trial process, and the judge's overriding obligation to impose an appropriate sentence in the context of the particular circumstance. The end result should always be a fair sentence for that person who has committed that crime. This is the first principle of sentencing, which all other principles are designed to support.*
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> *74. Caution must therefore be exercised, lest the rule be extended to a point where its very basis becomes undermined. Situations will arise where the court is perfectly satisfied that the lesser sentence is not an appropriate one; a sentence over which it had no control and one which it cannot interfere with. In such circumstances any requirement to reduce the longer period, which by and of itself is otherwise unobjectionable, would only serve to repeat the error and offend public confidence in the justice system. "*

23. I have already referred to McKechnie J's judgment in *DPP v. Duffy* [supra] where in the circumstances and on the facts of that case he decided that a suspended sentence should be imposed since two co-offenders who had been dealt with previously in the Circuit Criminal Court had been given suspended sentences for their part in the same cartel, and even though the learned judge stated that if he had been dealing with the other two accused he would have dealt with them differently. In so concluding, the learned judge stated at p. 641:

> *"However in this case, because of the principle of equality before the law, it seems to me that, even making allowances for the differences between the first and second accused on the one hand and Messrs. Durrigan and Doran and their companies on the other, a genuine sense of grievance could follow if I were to impose a sentence and demand its service by the first accused "*

24. It is not necessary for the purposes of the present case to reconcile these two judgments of McKechnie and discern the common principle, as a feature of all the cases to which I have been referred by Mr O'Malley is that they relate to parity or equality of sentencing rather than equality of treatment. For the purposes of the present case, that is a relevant distinction, since it seems to me that in the case of AB and RD they were not convicted of their offences simply because they were unemployed. Their offences were dismissed under the provisions of the Probation Act. The applicant on the other hand because she was working was convicted. No other distinctions were identified between the applicant and the other co-accused. All had pleaded guilty, all had no previous convictions, and there was no meaningful difference in the value of the goods which were the subject of the three different offences. In all respects these three accused were similarly situated, except that the applicant alone was employed, and therefore able to pay a fine. As I have said, if the applicant alone had been before the Court and pleaded guilty, there is little doubt that the conviction and fine would be hard to argue with. The judge clearly would have had a basis for the fine which was imposed. Taken in isolation, the applicant was dealt with appropriately, even if another judge may have imposed a lower fine. But the applicant's case cannot be viewed in isolation. All three offenders were before the Court. If all three having pleaded guilty were convicted and fined, and the applicant, because she was working, received a heavier fine than AB and DR, that too would be unobjectionable where some nominal fine was imposed on those who were not working. In such a situation their treatment would have been equal in the sense that all at least were convicted of the offence in view of their pleas of guilty. The difference in the level of fine would not amount to a breach of the parity principle, because of course the judge is bound to take into account the means of each individual offender. Persons similarly situated must be similarly treated. Where AB and RD to leave court without a conviction solely because they are unemployed, and their accomplice the applicant to leave court with a conviction because she is employed must leave the applicant, and indeed any reasonable observer, with a feeling that an unfairness has occurred. Public confidence in the administration of justice is central to the rule of law. It is important that the public know that justice is even-handed and that persons who are similarly situated will not receive different treatment because of some happenstance irrelevant to the question of guilt or innocence. The fact that a person is employed cannot be deciding factor as to whether a person receives a conviction, whatever about its clear relevance to penalty. Put the other way round, the fact that AB and RD were not working could not be a justification for their charges being dismissed, unless all three were dismissed.

25. As the present case is not a challenge to the decision made in respect of AB and DR, I must leave aside the question whether or not a strict reading of s.1 of the Probation of Offenders Act, 1907 entitled the judge to dismiss the charge under its provisions on the

sole basis that the offender is not employed. Section 1 of the Act of 1907 provides:

> *"1. (i) 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 recognisance, 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. " (emphasis added)*

There is no evidence as to the basis on which the first named respondent decided AB and DRD came within the provisions of s. 1 of the Act of 1907, except that he stated that they were not working. But it is hard to see how the question of whether or not they were working is relevant to whether or not to give them the benefit of the Probation Act. If in fact the judge was of the view that for example the offence was "trivial", and therefore within the section, then that triviality applies equally to the offence committed by the applicant, and the fact that she was employed at the time does not speak to its triviality, but is relevant only to any penalty to be imposed in the event of conviction. Even though the present application is not related to any challenge to the decision made in respect of AB and RD, the fact that they were dealt with under the provisions of the Probation Act is relevant to how differently the applicant was dealt with.

26. Given the provisions of s. 1 of the Act of 1907, the District Judge must be satisfied that the offender and/or the offence come within the section. In Sandes: Criminal Law and Procedure in the Republic of Ireland, 3rd edition (1951) at p.168, the author states:

> *"Before the District Justice deals with a case under the Probation of Offenders Act, 1907 he should be satisfied that the case falls under one of the specific headv of s. 1 of the Act, and should state specifically on which of the grounds he relies if he exercises the discretion conferred on him by the Act. "*

The author refers to the judgment of O'Sullivan P. in Gilroy v. Flynn [1926] I.R. 482 wherein it was held, inter alia, that before a District Justice can refuse to convict and apply the provisions of s. 1 of the Act of 1907 he must be satisfied as to the existence of one or more of the matters referred to in the section. In his judgment in the same case, Hanna J. went on to state that not only should the District Justice be so satisfied, but "*should state explicitly on which of the grounds he relies if he exercises this discretion*."

27. I refer to these matters because it does not appear to me that there was any basis provided by the evidence given before the first named respondent to make any relevant distinction between the applicant and the other co-accused simply on the basis that the latter were not working. That does not seem to me to be a valid distinction for the purpose of s. 1 of the Act of 1907, and could not justify the non-application of the Act to the applicant in circumstances where he was applying it to the others. Absent any such relevant distinction, or proven fact which would take the applicant outside the criteria set forth in the provisions of s. 1(1) of the Act of 1907 so that its provisions could not be applied to the applicant, it seems to me that where those provisions were being applied to AB and RD, the principle of equality of treatment required the first named respondent to apply it also to the applicant, given that without so doing, the applicant would have a recorded conviction and the others would not.

28. In these circumstances, I will grant an order of certiorari and quash the order of the first named respondent made on the 17th October 2011 whereby he convicted the respondent, including the fine imposed upon her. I do not propose granting the declaration sought in paragraph (d)(ii) of the Statement of Grounds.