Neutral Citation Number: [2010] IEHC 345

THE HIGH COURT

2010 923 SS

IN THE MATTER OF S. 52(1) OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961,

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR

AND

JOHN GILLIGAN

DEFENDANT

CONSULTATIVE CASE STATED

JUDGMENT of Mr. Justice Ryan delivered on the 10th day of September, 2010

1. This is a consultative case stated by Judge Gerard Haughton on a question of law that arises in a case at hearing before him. The background is set out in the Case dated the 28th May, 2010, which the learned judge stated at the request of the defendant. The judge poses the following question:-

> "Am I correct in law in holding that the fact that the accused has been subject to a prison disciplinary hearing which found that on the morning of the 30th July, 2008, he had a number of objects in his cell (including a mobile phone and SIM card) and which hearing imposed a forfeiture of all privileges for 56 days does not operate as a bar to a criminal prosecution of the accused for alleged possession of the mobile phone and SIM card on the same date contrary to s. 36 of the Prisons Act 2007?"

The issue arose in the course of submissions at the close of the prosecutions case against the defendant. He argued that the principle of double jeopardy arose because he had been subjected to prison disciplinary sanction and that operated to make it unlawful for a prosecution to proceed in respect of the criminal offence with which he was charged in the proceedings before the judge.

2. The judge gave a written judgment in which he dealt with the various arguments made by the defendant, including the point about double jeopardy. This was a careful, considered judgment dealing with the submissions and referring to relevant authorities and texts. The judge concluded his review and analysis as follows:-

> "In applying the principles outlined above I am of the opinion that the prison disciplinary procedure relating to the defendant was not a criminal trial and that the issue of double jeopardy does not arise."

The defendant asked the judge to state a case for the opinion of this Court and the judge was satisfied that the request was not frivolous or vexatious and acceded to it.

3. On the question posed by the learned judge, I am of the opinion that he was correct in law in holding as he did. I agree with his analysis and conclusion. I add here some further remarks only by way of comment and in deference to the arguments that were made at the hearing before me by counsel for the Director of Public Prosecutions, Mr. Paul Anthony McDermott, and counsel for the defendant, Mr. Martin Canny.

4. There is no authority for the argument that double jeopardy applies in this case. Cases that were cited from the United Kingdom, Canada and the United States are actually to the opposite effect and support the DPP's argument.

5. The European Court of Human Rights cases are the basis of Mr. Canny's argument. But they do not say that double jeopardy arises in these circumstances. Those cases focus on the nature of prison disciplinary procedures with a view to whether Article 6 rights are engaged. The question is whether a prisoner is entitled, for example, to legal representation in such proceedings. In that sense the issue arose as to whether such disciplinary inquiries were to be regarded as criminal and not purely matters of internal enforcement of rules. This is not to say that the European Court of Human Rights cases of *Engel, Campbell* and *Fell* and *Ezeh* and *Connors* are irrelevant. Far from it. But they must be considered in a context that is quite different from the particular double jeopardy issue that is raised in this case.

6. Applying the jurisprudence of these European Court cases, bearing in mind the limitation I have mentioned, three tests have been approved as to whether a proceeding should be considered criminal so as to give rise to Article 6 entitlements. First is how the matter is treated in national law. Obviously, this is not decisive because that could exclude Article 6 by the local categorisation alone. It is nevertheless relevant at the initial stage. This point is of more than nominal importance in Ireland because the Constitution prohibits the trial of offences otherwise than in a court.

7. The second criterion is the nature of the acts that constitute the breach of discipline. In this case, the facts are essentially the same that amount to breach of prison rules and for the criminal charge. The European Court recognises that some acts will constitute both disciplinary breaches and crimes against the public peace.

8. The third and most important point is the punishment. It is relevant to consider the range of penalty or sanction that may be

imposed, as well as the actual imposition in the particular case. It is clear that the disciplinary sanction of depravation of prison privileges in this case would not invoke Article 6. The maximum sentence that is provided for a breach of rules is deprivation of remission up to fourteen days and the European Court has not decided that that indicates criminal proceedings.

9. My conclusion is that the cumulative effect of the sanction imposed, the maximum sanction as described and the fact that it is in the nature of reduction of remission do not bring the prison disciplinary regime into the criminal category where Article 6 would be engaged.

10. If the position were otherwise and the disciplinary proceedings considered criminal so as to invoke Article 6, there is still nothing in the European case law to give rise to a double jeopardy prohibition.

11. Double jeopardy can only arise when there has been a previous criminal trial. See the Supreme Court decision in *D. S. v. The Judges of the Cork Circuit Court and the Director of Public Prosecutions* [2009] 1 ILRM 16. There has been no such prior proceeding here. The disciplinary proceeding in the prison and the prosecution in court are wholly different. Mr. McDermott in his submissions outlined many of the differences between the two processes and I agree with him. Differences in the presenting party, the venue, the timing, the purpose of the proceedings are some of the features that indicate fundamental differences. In the event of the case being proved, the outcomes in terms of sanction or sentence are also completely contrasting. The range of sanction open to the Governor is entirely related to the prison regime. All this emphasises the fundamental difference between prison discipline and its enforcement which are essential to good order, safety and security in the institution and a court whose function it is to administer justice in public in cases brought on behalf of the people as a matter of public and general law.

12. In my view, the learned judge was entirely correct in identifying the differences between the two procedures and in deciding that there was no question of double jeopardy because of the prior disciplinary sanction imposed on the defendant.