Neutral Citation: [2014] IEHC 142

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 704 J.R.]

BETWEEN

GARETH PHELAN

APPLICANT

AND

CIRCUIT JUDGE CATHERINE DELAHUNT AND THE DIRECTOR OF PUBLIC PROSECUTIONS AND THE COURTS SERVICE

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on 21st day of March, 2014

1. The applicant was granted leave to apply for judicial review on 31st July, 2012, by way of *certiorari* to challenge the decision of the first named respondent striking out his appeal to the Circuit Court against the order of conviction and sentence of the District Court on 16th April, 2012.

2. The applicant relies on a number of grounds which may be reduced to a claim that he had a right to be personally notified of the date of his appeal in order to enable him to be present personally at the hearing of his appeal. It was also claimed that he had a right to be present at his appeal.

3. On 16th April, 2012, the applicant appeared before Cloverhill District Court charged with a number of different offences prosecuted by different gardaí and to which he pleaded guilty. The District Court imposed a sentence of six months imprisonment in respect of driving without insurance and giving a false name. He was disqualified from driving for a period of six years and fined €500 payable forthwith with 30 days imprisonment in default of payment. He received a sentence of nine months imprisonment, suspended for a period of two years in respect of the balance of the charges.

4. On 26th April, 2012, the applicant lodged a notice of appeal and entered a recognisance in Cloverhill Prison to prosecute the appeal. This recognisance contained a condition that he attend court to prosecute the appeal on a date to be determined and to keep the peace and be of good behaviour.

5. On 28th May, 2012, the Courts Service received notice of the appellant's appeal from the Prison Service. On the same date the Courts Service wrote to the applicant at both Cloverhill Prison (where he entered the bond in the event that he was still there) and the address given on the bond, 2 Cloonmore Park, Jobstown, Tallaght informing him of the date and time of the appeal on 13th June, 2012. The letter suggested that the applicant notify his solicitor. It is not apparent from the affidavits whether the applicant was legally represented at the time of his conviction and sentence in the District Court.

6. The applicant claims that, at all material times following his release from prison, he resided at the address furnished, but did not receive a letter from the Courts Service in respect of the appeal date.

7. On 21st May, 2012, a warrant issued for the arrest of the applicant at Cloverhill District Court for an unrelated drugs prosecution because he failed to appear to answer his bail in respect of that matter.

8. On 13th June, 2012, the appeal was listed before the first named respondent. The case was called. The applicant was not present in court. He was not legally represented but counsel, who was familiar with the applicant from previous cases, indicated that she would inform the applicant's usual solicitors whom she knew to be Kelleher O'Doherty & Company, Solicitors, 90 North King Street, Smithfield, Dublin 7. The second named respondent then adjourned the case to 26th June, 2012, to enable the applicant to attend and prosecute his appeal. Members of An Garda Síochána were not directed or requested to inform the applicant of the adjourned date. The court notes that counsel appearing on that date had not been instructed in the matter, but was merely obliging the court by undertaking to notify the solicitors concerned.

9. The applicant's present solicitor in her affidavit states that counsel duly provided these details to the office which had a telephone number on file for the applicant. She states that repeated efforts were made to contact him on this number, which were unsuccessful.

10. On 25th June, 2012, a message was left with the applicant's brother by his present solicitors who apparently returned the call stating that it was unlikely that he would see his brother or be able to contact him before 26th June. The applicant, in his affidavit, accepts that contact was made with his brother to inform him of the adjourned date. He states that his mobile phone was "off and I could not be contacted". He also states that he was not speaking to his brother prior to 26th June and was, therefore, not aware of the message left by the solicitor with him. He does not explain his failure to return the repeated calls to his phone from his solicitor. On a date which is unspecified he claims that he was contacted by his brother "subsequent to 26th June, 2012" and immediately contacted his solicitor. It is not explained why his brother did not expect to be speaking to the applicant between 25th and 26th June. It is not explained how long the phone was turned off or why and no date is given as to when his brother finally contacted him.

11. On 26th June, counsel appeared instructed by the applicant's solicitors and informed the court that the solicitors had been unable to contact the applicant. Garda Damien Maher informed the court that the applicant had not been seen in the Tallaght area since 24th August, 2011, and that a warrant had issued for his arrest on his failure to appear before the District Court on 21st May, 2012. Garda Shane Whelan made attempts to notify the applicant of the date of the appeal by telephone, but did not succeed in contacting him. Garda Maher stated that at the time the warrant issued, the Gardaí did not believe that the applicant was living in Tallaght.

12. The applicant maintains in his affidavit that he at all material times wished to prosecute the appeal but could not because he was not informed of the date of the appeal.

13. In the District Court the applicant pleaded guilty to all charges upon which he was sentenced. He entered a recognisance in which he gave an address at which he could be contacted. It is clear from the evidence from Garda Maher, that the Gardaí did not believe that he lived in the Tallaght area for a considerable period prior to the appeal date. The court notes that two of the matters to which he pleaded guilty were offences under s. 13 of the Criminal Justice Act 1984, for failing to appear before a court in accordance with the recognisance. The onus of proof lies upon the applicant to establish that he resided at the relevant time at the address furnished. I have considered the evidence on this matter in accordance with the principles stated by O'Caoimh J. in *Molloy v. Director of Public Prosecutions & Reilly* (Unreported, High Court, 1st December, 2000). The court is not satisfied on the evidence that the applicant was living at the address provided in the recognisance to which the letter was sent between the date of his release from prison and 26th June.

14. In *Lawlor v. Hogan* [1993] ILRM 606, Murphy J. stated the basis upon which the court might proceed in the absence of an accused:-

> "1. An accused has a fundamental constitutional right to be present and to follow the proceedings against him.
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> 2. Insofar as the judicial process in criminal matters expressly requires matters to be dealt with by or in relation to the individual accused, clearly he must be present to enable these functions to be performed.
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> 3. If a trial judge is satisfied that the accused consciously decided to absent himself from the trial (at a time when his presence is not essential to enable some particular procedure to be complied with) then the trial judge would be entitled in his discretion to proceed with the trial notwithstanding the absence of the accused."

15. In *O'Brien v. Coughlan* [2011] IEHC 330, the applicant was not present for his trial, though he was represented by his solicitor. No explanation was offered for his absence and the solicitor applied for an adjournment, or alternatively invited the court to consider the issuing of a bench warrant to procure his client's attendance. The respondent District Judge refused to grant an adjournment and proceeded to hear and determine the matter in the applicant's absence. The applicant was convicted after which the applicant's solicitor again requested that a bench warrant issue and that sentence be deferred until the bench warrant had been executed. This was refused and the applicant was sentenced to five months imprisonment and a driving disqualification order. The applicant finally advanced a reason to explain his non-attendance in the District Court following the initiation of judicial review proceedings. He claimed that he was not present for his trial because he had mistakenly believed that his case had been adjourned to the following day. No contradicting evidence had been offered by or on behalf of the respondent. The applicant had been present on the date when his trial was fixed. He had 54 previous convictions for road traffic offences. Kearns P. determined that he was, therefore, an unlikely candidate to have mistaken an upcoming date of a court hearing which was announced when he was present in court, and rejected the explanation offered. The learned President was satisfied that the District Judge was entitled to proceed with the trial and reach a conclusion as to guilt or innocence. However, the court was also satisfied that the District Judge acted without jurisdiction in proceeding to sentence the applicant to a term of five months imprisonment, which must be regarded as a sentence of substance, without first affording the applicant an opportunity to be heard prior to the imposition of sentence (applying the decision of the Supreme Court in *Brennan v. Windle* [2003] 3 I.R. 494). A sentencing judge who has in mind the imposition of a prison sentence of some length in circumstances where the offence in question would not invariably attract a prison sentence must at least ascertain if there is a *bona fide* reason for non-attendance or make some effort to secure the attendance of the applicant and to hear him before proceeding to impose the sentence.

16. In *McCann v. His Honour Judge Groarke & the Director of Public Prosecutions* [2001] 3 I.R. 431, the applicant pleaded guilty to criminal charges in the District Court. After sentence, the applicant appealed both conviction and sentence. On the first hearing date the appeal was adjourned on consent to a later sitting of the Circuit Court in Dundalk. On that date there was no appearance by the applicant or any solicitor acting on his behalf. The learned Circuit Judge made an order striking out the appeal and affirming the order of the District Court. The applicant sought *certiorari* of that order on the basis that it was the usual practice of the Circuit Court office in Dundalk to inform "out of town" solicitors, such as the applicant's solicitors, of the date of the hearing of any matter listed for the sittings of the Circuit Court in Dundalk. The application was refused. It was claimed that the Circuit Court office in Dundalk had an obligation to inform the applicant and his solicitors of the exact date of the hearing of the applicant's appeal, and that this had not been discharged. The applicant's solicitors contended that it was not his duty to attend the particular sessions of the Circuit Court in order to prosecute the applicant's appeal having regard to the practice in respect of out of town solicitors. Herbert J. totally rejected this submission. He held that it was at all times the duty of the applicant and, therefore, of his solicitors to prosecute the appeal and to take active measures to appraise themselves of the adjourned date for hearing. It was their duty to be present on that date or any other date to which the court might have occasion to further adjourn the appeal. The learned judge stated that the Circuit Court office was under no duty whatsoever to assume the function of a watchdog for the applicant or his solicitors as regards the date of the appeal. He added:-

> "In my judgment there was no failure to afford fair procedures in this case. The first respondent was acting *intra vires* his powers in striking out this appeal, if that is in fact what he did, in default of appearance: *The King (McMonagle) v. Justices of Donegal* [1905] 2 I.R. 644; *The State (Dunne) v. Martin* [1982] I.R. 229 (Supreme Court, per Henchy J.). If the applicant was not heard on this occasion it was entirely due to his own failure to attend before the court, or alternatively or additionally, due to his solicitors' failure to notify him of the adjourned date or to appear before the court. In the absence of some compelling evidence which would establish that the decision of the first respondent was in the circumstances irrational, unreasonable or tainted with bias - and there is no such evidence to be found in this case - the proper administration of justice must require that the court has and utilises the power to strike out or to dismiss an appeal for default of appearance on the part of the applicant or anyone on his behalf."

17. In this case the applicant did not appear to prosecute his appeal and, therefore, the matter was struck out. The learned Circuit Judge did not embark upon the appeal and no order was made varying the District Court order. The learned judge, therefore, acted within jurisdiction in striking out the appeal. (*McCann, McMonagle* and *The State (Dunne) v. Martin supra*). It is clear that no application was made in this case seeking re-entry of the appeal notwithstanding the fact that the applicant claims that he "immediately" contacted his solicitors when he heard that the appeal had been struck out.

18. The issue in this case concerns the adequacy of the notice given to the applicant of the date upon which his appeal would be heard on 13th June, 2012, and whether the steps taken by the learned Circuit Judge on his non-appearance on that date in adjourning the matter to 26th June to furnish him with a second opportunity to prosecute his appeal were fair and reasonable or whether the Circuit Court should have taken some further step in order to procure his attendance before striking out his appeal.

19. It is clear from the evidence that it is the normal practice of the Courts Service in Dublin to notify appellants, who appeal from prison, of their appeal dates by letters sent by prepaid post. The Service does not normally notify a solicitor who has previously acted for an appellant directly unless requested to do so by the appellant.

20. I am not satisfied that the failure to inform the applicant personally or by registered post or by some other form of notice than that of prepaid post, vitiates the decision to strike out the appeal in this case. I am not satisfied on the evidence that the applicant was unaware of the date of his appeal. On 13th June, the learned Circuit Judge, notwithstanding the applicant's unexplained absence, as a matter of fairness, adjourned the appeal to give the appellant a second opportunity to attend and prosecute the matter. On 26th June, the court was informed that the solicitors had been unable to contact the applicant in the interim as had the Gardaí and his brother. Furthermore, the court was told that he had not been living in the Tallaght area for a considerable period prior to the hearing of the appeal, including the date upon which the letter was sent. The court was also informed that a warrant had issued for his arrest on 21st May because he had failed to turn up to his trial in the District Court in respect of a separate matter. The applicant also remained out of contact with his brother and his solicitor. It was noted that the solicitors made a number of attempts to contact him on his mobile phone number and there is no explanation as to why these efforts failed, apart from a reference in the affidavit suggesting that his phone was off when his brother tried to make contact with him. I find this explanation entirely inadequate and contrived. I am satisfied that the learned Circuit Judge made every effort to give the appellant an opportunity to prosecute his appeal, but he made himself unavailable to the Gardaí, his brother and his solicitors. It is clear that in striking out the appeal the learned Judge had sufficient evidence to justify the exercise of her discretion in that regard.

21. I am also satisfied that this is not a case in which it was appropriate to issue a warrant. The matter is entirely distinguishable from the *Brennan* decision in which following conviction in the course of a hearing in the District Court, the trial judge when contemplating the imposition of a sentence of imprisonment, failed to take steps to procure the attendance of the accused before proceeding to impose the sentence. In this case the appeal was struck out and the court did not embark on any hearing of the merits of the case which the applicant showed very little interest in pursuing.

22. Therefore, this application is dismissed.