THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 65
Record No. 2015/465

Finlay Geoghegan J.
Hogan J.
Hedigan J.

BETWEEN/

PHILIP CROAKE

APPLICANT/ APPELLANT

- AND -

DISTRICT JUDGE MICHAEL COUGHLAN
- AND -
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 3rd day of March 2017

1. On the 22nd May 2014 the applicant, Mr. Croake, was charged in the District Court with the possession of a knife contrary to s. 9(1) of the Firearms and Offensive Weapons Act 1990, as amended by s. 39 of the Criminal Justice (Miscellaneous Provisions) Act 2009. The applicant pleaded not guilty and fully contested the charge. Although the charge was proved, the Court nonetheless, having heard counsel as to the circumstances of the applicant, nonetheless applied s. 1(1) of the Probation of Offences Act 1907 ("the 1907 Act") and the applicant was released conditionally in his own bond of €300 (with no cash lodgment required) with 30 days' imprisonment in default of payment for a period of 12 months. He was also made subject to the conditions that he be of good behaviour and that he be under the supervision of the Probation and Welfare Service and appear for conviction and sentence at any time within 12 months.

2. The applicant was dissatisfied with this order and he instructed his counsel to apply to have recognisances fixed for the purposes of an appeal to the Circuit Court. An appeal lies to the Circuit Court against the making of a conditional order of release under s. 1(1) of the 1907 Act: see s. 33 of the Courts of Justice Act 1953.

3. The District Court accordingly fixed recognisances in the amount of €500 own bond (with no lodgement) and an independent surety in the amount of €500 (again with no lodgement required). The applicant's counsel protested in respect of the independent surety requirement given the applicant's unblemished history of compliance with bail conditions and the genuineness of the appeal. Counsel also drew attention to the applicant's personal circumstances: he was unemployed with limited means. The District Judge refused, however, to vary the independent surety requirement saying that he wanted to ensure that the appeal was prosecuted.

4. The applicant then duly lodged an appeal with the Circuit Court where the appeal was first listed on 22nd July 2014. It is not disputed but that had the appeal proceeded, it was likely to have been disposed of within about a further six months period from that date. It is true, of course, that the applicant was not facing a custodial sentence. By reason of the order made he was still subject to the supervision requirements of the Probation and Welfare Service and the applicant – who continued to maintain his innocence – wished to have that order stayed pending an appeal. It is, however, clear that the effect of Order 101, rr. 4 and 6 of the District Court Rules – the terms of which I shall consider in more detail presently – is that no such stay is possible unless an appellant enters upon a recognizance. This simply served to highlight the dilemma which the applicant faced, as the requirement of the independent surety effectively prevented him from entering into a recognizance. Given his background – he is unemployed and impecunious – he has few friends or acquaintances who would be prepared to act as surety in such circumstances and who would have sufficient means to meet this requirement.

5. This is the background to the present application for judicial review. In advance of the appeal being listed before the Circuit Court the applicant had applied to the High Court for leave to apply for judicial review to quash the independent surety requirement. Leave to apply was duly granted by Peart J. on 23rd June 2014. The High Court order granting leave also provided for an order staying the operation of the District Court order pending the outcome of the present proceedings.

6. At the hearing of the present appeal the Court was informed that the Circuit Court appeal had proceeded in the interval with the Circuit Court judge affirming the finding of the District Court on 5th July 2016 and directing that the applicant pay €150 to charity. The question of whether the 1907 Act should be applied to the applicant was further adjourned to a later date.

The decision of the High Court

7. This is an appeal brought by the applicant against the decision of the High Court (Noonan J.) delivered on 30th July 2015 which refused to grant him the relief he sought: see Croake v. Coughlan [2015] IEHC 515.

8. In his judgment Noonan J. considered that the independent surety requirement was not a burdensome one and the decision of the District Court could, in any event, be appealed. He further rejected the argument that the decision to require an independent surety to post a bond of €500 was unreasonable in law.

> "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 L.C.J. 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 be 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."

9. The applicant now appeals to this Court against that decision. I propose presently to examine the reasons given by Noonan J. in the course of a consideration of the legal issues presented on the appeal. Before doing so, it is, however, first necessary to set out the relevant provisions of the District Court Rules.

Order 101 of the District Court Rules

10. The Order 101, r. 4 of the District Court Rules 1997 (as substituted by Article 9 of the District Court (Criminal Justice Act 2007) Rules 2008 (S.I. No. 41 of 2008) states:

> "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 recognisance for the purpose of appeal shall be fixed by the Court. The amount (if any) of the recognisance 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 recognisance may be made ex parte. A sum of money equivalent to the amount (if any) conditioned by the recognisance may be accepted in lieu of a surety or sureties. The recognisance 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."

11. It is clear that the District Court is *obliged* to fix recognisances, but the amount of the recognisance (if any) falls to be determined by the Court. It is also clear that the amount so fixed must itself be at a reasonable level. Order 101, r. 6 then further provides:-

> "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 for payment of the penalty, or for the 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."

12. It is clear, therefore, that the District Court order will only be stayed pending an appeal to the Circuit Court where such an appellant has entered into a recognisance.

Whether the appeal is moot

13. Counsel for the Director contended that the case was now moot by reason of the events which occurred in the Circuit Court since the decision of the High Court. Given, however, that the High Court pronounced on important issues of principle governing District Court practice, it can be said that this is a case which, in the words of Denham C.J. in *Farrell v. Governor of St. Patrick's Institution* [2015] IECA 30, [2014] 1 I.R. 699, 709 affects many criminal cases in the District Court and the decision itself has a "systemic relevance" to cases before the courts.

14. In these circumstances I consider it is appropriate that this Court should exercise its discretion to entertain the appeal, even if it is otherwise technically moot for all the reasons outlined by Denham C.J. in her judgment in *Farrell* on this very point.

The independent surety requirement
15. The fundamental submission advanced by the applicant is that the District Judge acted unreasonably and irrationally in fixing an independent surety requirement with a requirement to enter into a bond of €500. Indeed, the unchallenged evidence before the High Court was that this was a more onerous requirement that might initially appear or that which, with respect, Noonan J. appeared in his judgment to allow.

16. In this regard I fear that I must disagree with the analysis of Noonan J. insofar he suggested that merely because the District Judge commenced with a jurisdiction under Order 101 of the District Court Rules to fix a recognisance, it cannot be said that he lost that jurisdiction by fixing the amount at too elevated a level. It is, however, clear by reference to all the contemporary authorities that a judge or tribunal may commence with jurisdiction to hear or determine a particular yet lose that jurisdiction through error in the course of the proceedings. The classic modern statement remains that of Henchy J. in *The State (Holland) v. Kennedy* [1977] I.R. 193,201 where he said:

> "The respondent District Justice undoubtedly had jurisdiction to enter on the hearing of this prosecution. But it does not necessarily follow that a court or tribunal, vested with powers of a judicial nature, which commences a hearing within jurisdiction will be treated as continuing to act within jurisdiction. For any one of a number of reasons it may exceed its jurisdiction and thereby make its decisions liable to be quashed on certiorari. For instance, it may fall into an unconstitutionality or it may breach the requirements of natural justice, or it may fail to stay within the bounds of the jurisdiction conferred on it by statute. It is an error of the latter kind that prevents the impugned order in this case from being held to have been made within jurisdiction."

17. So far as the jurisdiction to require an independent surety conferred by Order 101 is concerned, that jurisdiction is impliedly limited by precepts of reasonableness, rationality and general constitutional fairness. In the event that the District Court were to breach any of these requirements by making an order requiring an independent surety, the error could not be regarded as otherwise than without jurisdiction.

18. The evidence in the present case established that the practice in the District Court is that an examination of the independent surety's means is required, so that the prospective surety must demonstrate that he or she has the appropriate sum available in a bank, credit union or building society account. Order 18, r. 5(2)(b) of the District Court Rules then provides that this money is effectively frozen in that account, as the court order will direct that the funds in that account must remain above the surety's bond, in this case, €500. The Gardaí will also be asked for their views on the appropriateness of the surety prior to the surety being approved by the Court.

19. These requirements are, moreover, the reason why District Court judges are often asked in such cases whether a cash payment in lieu of a bond will suffice. The District Court possesses such a power to accept such a cash payment: see s. 26 of the Criminal Procedure Act 1967 ("the 1967 Act"). A cash payment is nonetheless in practice often a less onerous condition as it dispenses with the necessity for a surety to be approved and nor does it have the effect of freezing an account in the manner I have just described. Where, of course, one is entirely dependent on social security payments and living from week to week, a freezing order of this kind for this amount for a period of months will generally represent a very significant interference with vital cash flow.

Is there an alternative remedy available to the applicant?
20. Perhaps the first issue which arises for consideration is whether there is an alternative remedy other than judicial review proceedings available to the applicant. While I do not overlook the fact that the applicant would otherwise have been subject to the requirement to engage with the Probation and Welfare Service were it not for the fact that the District Court order was stayed in these judicial review proceedings, one might nonetheless think that matters relating to recognisances would best be dealt with by means of a routine and straightforward appeal against the District Court order requiring an independent surety. This, however, assumes that such an appellate remedy is open to the applicant. But is there such a right of appeal?

21. If there were to be such a right of appeal against the decision of the District Court in relation to the fixing of recognisances, then it would have to be provided for "by law" in the manner contemplated by Article 34.3.4 of the Constitution. The term "law" in this context "means statute law and….the right of appeal [in Article 34.3.4] is one which requires statutory vesture": see *The State (Hunt) v. O'Donovan* [1975] I.R. 39, 48, per Finlay J. As it happens, statute law does indeed provide for a right of appeal against the imposition of bail conditions by the District Court. The difficulty confronting the applicant is that the only statutory provisions which the helpful researches of counsel could identify do not appear to apply in a case such as the present one where the condition was imposed as part of a recognisance in the event of an appeal.

22. The right of appeal against either the refusal of bail or the grant of bail subject to conditions by the District Court is provided for by s. 28 of the 1967 Act (as substituted by s. 19 of the Criminal Justice Act 2007).

> "(3)(a) An applicant for bail or the prosecutor may appeal to the High Court if dissatisfied with a refusal or grant of the application for bail or, where bail is granted, with any matter relating to the bail.
>
> (b) Where the applicant has been remanded in custody by the District Court and the offence with which the applicant is charged is triable by the Circuit Court, the High Court may transfer the appeal to the judge of the Circuit Court for the circuit in which the prison or place of detention to which the applicant has been remanded is situated.
>
> (c) The judge of the Circuit Court referred to in paragraph (b) shall exercise jurisdiction in respect of the appeal.
>
> (d) An appeal against a decision by the Circuit Court under this section lies to the High Court at the instance of the applicant or prosecutor."

23. It will be seen that s. 28(3)(a) of the 1967 Act provides for a right of appeal in such bail cases to the High Court (albeit that the High Court may in some instances transfer the application to the Circuit Court). The term "bail" is, however, defined for this purpose by s. 22 of the 1967 Act as a reference to a conditional release under s. 22(1)(b):

> "Where the District Court remands a person or sends him forward for trial or sentence, the Court may:-
>
> (a) commit him to prison or other lawful custody or
>
> (b) release him conditionally on his entering into a recognisance, with or without sureties."

24. It is clear, however, that in the present case the applicant was not an applicant for bail in the sense in which this term has been defined for the purposes of ss. 22 and 28 of the 1967 Act because he was neither remanded or sent forward for trial or sentence by the District Court. Contrary, therefore, to what Noonan J. appeared to consider, it would appear to follow, therefore, that there is in fact no right of appeal against the District Court's decision in so far as the requirement of an independent surety for the purposes of a recognisance is concerned. At all events, as I have already indicated, the researches of counsel have not identified any other statutory provision which might provide such a right of appeal.

25. It follows, therefore, that if this applicant is to have a remedy in these circumstances, it must be by way of judicial review.

Whether the decision of the District Court was unreasonable in law?
26. There is no question but that in view of the provisions of Order 101, r. 1 the District Court had a jurisdiction to require the provision of a surety. It cannot be said that the decision of the District Court to require a surety was *in itself* unreasonable in law, since a requirement of this kind served the objective of ensuring that only genuine appeals were prosecuted. In arriving at that conclusion I have not overlooked the fact that the applicant was, in effect, a first time offender; that he had always complied with his bail conditions and that he was most anxious to prosecute his appeal.

27. What, then, of the requirement that this applicant provide an independent surety? As it happens, my own decision in *O'Brien v. Director of Public Prosecutions* [2014] IEHC 461 touched on that very question. In *O'Brien* the applicant had sought release from a six month sentence by way of an Article 40 application following what he contended was an unfair sentencing hearing. The applicant in that case had, however, pleaded guilty to the robbery of a schoolboy and he had some 77 previous convictions.

28. Having listened to the digital audio recording of the hearing before the District Court, I rejected the argument that the sentence hearing was unfair. I then continued:

> "In these circumstances, the applicant's proper remedy is to appeal the sentence decision to the Circuit Court. In explaining why the applicant elected to pursue the Article 40 route rather than to lodge an appeal, counsel for the applicant, Mr. O'Loughlin SC, emphasised that the recognisances had been fixed in the event of an appeal at €800, with a cash lodgement of €400. He maintained that, given his client's difficult financial plight, a lodgement of that kind made the right of appeal illusory. While I am finding against the applicant so far as the Article 40 issue is concerned, the amount of the cash lodgement required in the case of an impecunious and unemployed defendant such as the applicant with two young children and who is presumably entirely dependent on social security payments is, I confess, somewhat troubling. As I explained in my judgment in *McCabe v. Ireland* [2014] IEHC 345, whilst the right of appeal against the imposition of sentence by a court of local and limited jurisdiction is subject to regulation by law in the light of the express provisions of Article 34.3.4 of the Constitution, it must nonetheless be regarded in the light of this self-same provision as a fundamental constitutional value. Furthermore, that right of appeal must be capable of being exercised in a realistic and effective manner."

29. While these comments were strictly obiter, they nonetheless have some relevance to the present case. It is true, of course, that, as I have just observed, Article 34.3.4. expressly provides that the right of appeal from the District Court to the Circuit Court is subject to regulation by law. Nevertheless, where (as here) that right has in fact been conferred by law, it falls with the ambit of constitutional protection. Accordingly, where – as here – it is alleged that the exercise of a discretion fundamentally affects the substance of a constitutionally protected right , then the appropriate test is that articulated by Denham J. in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701 where she said:-

> "In determining the reasonableness of an administrative decision which affects or concerns constitutional rights the standard to be applied is that stated by Henchy J., in *The State (Keegan) v. Stardust Victims' Compensation Tribunal* [1986] I.R. 642, 658:-
>
> > "I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted ultra vires, for the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties require, inter alia, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision."
>
> This test includes the implied constitutional limitation of jurisdiction of all decision-making which affects rights and duties, inter alia, the decision-maker should not disregard fundamental reason or common sense in reaching his or her decision. The constitutional limitation of jurisdiction arises inter alia from the duty of the courts to protect constitutional rights. When a decision-maker makes a decision which affects rights then, on reviewing the reasonableness of the decision: (a) the means must be rationally connected to the objective of the legislation and not arbitrary, unfair or based on irrational considerations; (b) the rights of the person must be impaired as little as possible; and (c) the effect on rights should be proportional to the objective."

30. Applying that test to the present case, it seems to me that in the particular circumstances presented here, the imposition of a requirement that the independent surety provide a bond of €500 was unreasonable. Given the somewhat burdensome nature of suretyship in this context – the necessity to have a bank account, to have one's finances examined, to be approved by the District Court and to submit to a freezing order requiring the surety to maintain a cash balance of at least €500 in the account pending the outcome of the appeal – and the circumstances of the applicant given to the District Judge in relation to the application of s.1 of the 1907 Act which lead him to make an order for conditional release on the applicant's own bond of €300, it was unlikely in practice that this particular applicant would be able to produce such an independent surety. Without a surety, there can be no recognisance. And without a recognisance, the District Court order will not be stayed.

31. Measured, therefore, by the standards articulated by the majority in *Meadows*, it seems to me that the requirement that of an independent surety is unreasonable in the sense that it impairs the substance of any effective right of appeal which the applicant might otherwise have enjoyed. Given the applicant's own personal circumstances and the social *milieu* from which he comes (of which the District Judge had been made aware and seemed to have accepted having regard to the order which he made under the 1907 Act), a requirement of this kind effectively precluded this applicant from entering into a recognisance for all the reasons I have already described.

32. In summary, therefore, in the special circumstances of the present case, the requirement of an independent surety was unreasonable in the *Meadows* sense of that term. In the particular circumstances of this case this meant that this right of appeal

could not be exercised in what I described in *O'Brien* as a "realistic and effective manner".

Conclusions

33. In conclusion, therefore, I would allow the appeal and would quash the decision of the District Court insofar as the applicant was required to provide an independent surety as a condition of the fixing of a recognisance.