THE COURT OF APPEAL

JUDICIAL REVIEW

[2014 No. 26 COA]

The President

Kelly J.

Peart J.

BETWEEN

MICHAEL O'BRIEN

APPLICANT/APPELLANT

AND

DISTRICT JUDGE JOHN COUGHLAN AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of the Court delivered by the President on 10th November 2015

1. This is an appeal from the judgment and order of the High Court (Kearns P.) refusing the various reliefs that were sought in the application for judicial review brought by Mr. Michael O'Brien.

2. The case concerns proceedings in the District Court at Naas before the respondent judge on 9th May 2013. On that occasion, the appellant, Mr. O'Brien, pleaded guilty to two road traffic charges. The orders of conviction record the offences as use of a vehicle without insurance contrary to s. 56 of the Road Traffic Act 1961 (as amended), and "driving a vehicle while disqualified" contrary to s. 38 of the Road Traffic Act 1961 (as amended). Evidence was given that Mr. O'Brien had 14 previous convictions for road traffic offences, including two for driving while disqualified and five for driving without insurance. The judge sentenced him to a term of four months' imprisonment and disqualified him from driving for 40 years. It appears that the imprisonment and disqualification were imposed on the offence of driving while disqualified and the charge of driving without insurance was taken into consideration.

3. Mr. O'Brien brought judicial review proceedings and was granted leave on grounds that were subsequently extended by order of the High Court. The issues that were considered by the High Court and that arise on this appeal are as follows:-

(a) the respondent failed to consider whether to make a community service order in respect of Mr. O'Brien as an alternative to a custodial sentence. In thus failing, the judge was in breach of the Criminal Justice (Community Service) (Amendment) Act 2011;

(b) the respondent failed to conduct a proper enquiry into whether Mr. O'Brien was entitled to legal aid;

(c) the ban on driving for a period of 40 years is wholly unreasonable and contrary to law;

(d) the offence of driving while disqualified does not exist in law and the conviction does not show jurisdiction because it recites an incorrect statutory basis for the purported offence and the charge, as preferred, was prejudicial insofar as it recited the previous conviction of the accused person.

4. We shall now turn to consider these points in turn.

Community Service

5. Section 3 of the 2011 Act effects a significant change in the previous legislation in the 1983 Act. The section provides that where a Court is of opinion that the appropriate sentence for the offence committed by the offender would be imprisonment for a period of 12 months or less, the Court is required to consider making a community service order. Where the Court is of opinion that the appropriate sentence would, but for the Act, be one of imprisonment for more than 12 months, the Court may make a community service order. The Court has to be satisfied that the person is suitable for such an order before directing community service in lieu of imprisonment. The offender's consent is required before an order can be made (see sections 1 and 4 of the Principal Act (as amended)).

6. It was submitted on Mr. O'Brien's behalf that the respondent judge failed to address the suitability of Mr. O'Brien for a community service order, which was a mandatory obligation given that he imposed a sentence of four months' imprisonment.

7. Kearns P. held that the judge "was not required to expressly state reasons for not imposing community service where the same was not sought or consented to". Judges of the District Court are often required to consider the imposition of short custodial sentences and so the provision about community service was of particular relevance. It had to be presumed that District Judges were aware of their obligation to consider community service as an alternative. He did not consider that there was a need to state openly and in detail the reasons why community service was not suitable in every individual case. He held that it was an obvious inference in this case from the undisputed facts that the judge felt that a custodial sentence was necessary: "this is particularly the case when the issue of community service is never raised or consented to by a defendant's legal representatives". Moreover, the applicant had a remedy available to him by way of an appeal to the Circuit Court where his legal representatives could argue for a community service order.

8. The argument on Mr. O'Brien's behalf is that the respondent was under an obligation, not only to address himself to the question of community service in the particular case, but to express himself as having done so. He was under an obligation to say that he had in fact considered community service. He had to, at the very least, make some reference to community service. It was therefore not open to the learned President to infer that the judge had taken it into account. It was submitted that the statutory obligation goes further and the Court must obtain a report in respect of the suitability of the offender to be made subject to a community service order. In my view, one can reject the latter submission at once. It is clearly the intent of the section and is so stated that the report is to be obtained in circumstances where the judge considers that the offender is a person who may be appropriate for a community service order. If the judge is not of that view, there is no requirement, nor could there be, on the judge to direct a report. The judge's consideration that the offender may be appropriate is the first step. It would make no sense to require the preparation of a probation report in every case when the judge was not satisfied that it was appropriate to consider such alternative to a prison sentence.

9. The appellant submitted that it has to be inferred that the judge did not consider community service because of his failure to refer to it and that amounts to a breach of the statutory requirement and accordingly rendered the sentence unlawful.

10. The Director submitted that the judge was not obliged to state expressly that he had considered the provisions of s. 3(1) of the Act (as amended). Neither was he required to state reasons for imposing imprisonment rather than community service. Neither of these obligations is contained in the section. It was submitted that this was in contrast to community service provisions in other countries and with other Irish legislation. If reasons are to be required, there is no form in which they are to be expressed and it may well be possible to infer the reasons from what the judge says. In this case, the judge's remarks refer to the seriousness of the case and the offender's previous record and this gives rise to such an inference. Even if the judge had said nothing, the mere fact of the offender's record and the nature of that record leads to that inference. It was submitted that there is no indication or suggestion that the legal advisers of the offender made any reference to this or drew the Court's attention to the possibility of community service and the duty to assist the Court is not confined to the prosecution.

11. The defence has its own obligations in this regard, and particularly in regard to matters which may assist the convicted person. The Director also submitted that any failure in respect of consideration of community service is properly a matter of appeal and not for judicial review. Insofar as it is to be considered as an error, which is a conclusion that the Director opposes for the reasons stated, the matter is within jurisdiction and the appellant has a remedy by way of appeal to the Circuit Court where he is entitled to have a full rehearing of the case.

Discussion

12. A Court is under an obligation not simply to give its decision, but to give the reasons why it reached the decision. That is, however, a quite different obligation from what is proposed in this case. The judge was required to take into account the option of community service when deciding on sentence. That does not mean that he had to spell out expressly that he had performed his statutory duty in this regard. Obviously, he had to take it into account but he did not have to state that he had done so. It may well be desirable in general circumstances for him to do so, if only to reassure anybody who might be in doubt about the matter, but it is not an obligatory requirement in the sense that failure to do so inevitably results in the invalidation of the judgment that he gives.

13. It is also true that a judge's reasoning does not have to be set out in any specific or particular form. It is clear that the judge thought that this case was a serious one, a view which he was perfectly entitled to reach, having regard to the circumstances. The particularly serious features were the repeated criminal offending in the same fashion. It would indeed have been a very lenient view if the judge thought that this was a suitable case for community service. Whatever about that, the point is that the failure to specify that he had taken into account the question of community service does not furnish a sufficient or any basis for invalidating the judgment.

14. Any such omission does not infringe the precept that a Court is expected and required to give reasons for its decision. Kearns P. was correct in saying that it would be absurd to expect every judge to recite everything that he or she had taken into account in arriving at the decision. That would impose an obligation to specify a long list of legal and factual matters in every case and would be wholly unrealistic.

15. If the judge mentions that he has taken section 3 into consideration that avoids any uncertainty or speculation but the Act does not mandate such statement and it must be presumed that the judge complied with the statutory obligation; there is no basis for a reviewing court to infer failure to do so from the single fact without anything more of omission to mention the section when imposing sentence. There would have to be some basis in fact for the inference, over and above the mere omission.

16. It is proper for the defence lawyer to invite the judge to impose a community service order instead of prison. There is something seriously wrong with a model of justice that would leave a busy judge dealing with a long list exposed to judicial review because he omitted to mention a matter that is in the interest of the defendant, that the latter's legally-aided solicitor should propose for consideration if relevant, that the solicitor could inquire about and confirm after sentence that the judge had taken it into account.

17. A defence solicitor who failed to refer to community service in submissions may be open to criticism. It is difficult to see how a defendant can impeach his conviction on this ground merely because the judge did not say that he had considered community service when his own lawyer (1) could and arguably should have proposed that course and (2) if in doubt whether the judge might have overlooked the statutory requirement could have inquired or reminded the judge after sentence. It is unacceptable that a solicitor would lie low, so to speak, and say nothing in the hope that the judge would fail to mention community service and then seek judicial review.

18. There are usually some "afters" in a District Court conviction, including fixing recognisances in the event of an appeal. In this case there was also an application for legal aid, which is another ground on which the conviction is challenged. There was accordingly ample opportunity to bring up community service if there was any uncertainty that it had been considered.

Legal Aid

19. The evidence on this matter is that the solicitor for Mr. O'Brien applied for legal aid and proffered a statement of means, but the judge said that he would not grant legal aid without first seeing full bank statements from Mr. O'Brien and his wife together with Social Welfare documentation. The judge said he was not refusing legal aid and then moved on to the next case and he refused the solicitor's request for an adjournment. The learned President considered the submission that this represented in fact a refusal of legal aid to Mr. O'Brien. Kearns P. noted that Counsel had informed the Court that there was a practice in some District Courts whereby cases were heard before the issue of legal aid was decided on. Counsel for the Director accepted that it was unusual for a statement of means not to be considered sufficient for the purpose of a legal aid application. The High Court concluded that the fact was that Mr. O'Brien had legal representation and he refused certiorari on this aspect of the case.

20. It was submitted that the judge did not fix a further date for the legal aid question to be decided and that the effect of the order of conviction and sentence was to bring proceedings to an end. Although the judge required further information in the form of bank statements and Social Welfare documentation, he did not give Mr. O'Brien an opportunity to produce the material. There was, it was submitted, a failure of the Court to conduct an adequate inquiry into the matter specified in s. 2(1) of the Criminal Justice (Legal Aid) Act 1961.

21. The Director submitted that the respondent judge did not in fact refuse or deny legal aid to Mr. O'Brien. It is not in doubt that a person of insufficient means to pay for his own representation is entitled to free legal aid. A judge is entitled to seek further information beside a statement of means in order to determine that the person's means are insufficient.

Discussion

22. I also think that this point does not have any merit. The applicant was legally represented in Court by a solicitor. The practice of leaving it to the end of the case, or indeed subsequently, to decide on the application for legal aid may have its advantages and disadvantages, but it is not suggested that there is anything inherently unlawful about it. It may be that an applicant or a solicitor may wish to have the matter made certain before the case proceeds and he or she is entitled to make that application to the Court.

23. There is, it seems to me, a misunderstanding here. There was nothing to stop the judge from granting legal aid retrospectively, as I understand it. In fact, that was actually the practice and is referred to by agreement between Counsel as happening in some District Courts. It follows that there was nothing to stop the solicitor from seeking confirmation that his client was entitled to legal aid and the solicitor would duly receive payment on that basis. The fact that the judge wanted to see some further information does not make the process unlawful. In the event, it seems, according to the evidence, that Mr. O'Brien did not actually have a bank account and neither did his wife. But those matters could be put before the judge in due course when the application for legal aid came to be heard. The solicitor could go back to the Court and apply for legal aid for the case that had been heard. The fact that the judge actually encourages or employs such a procedure makes it even more appropriate that the application should be made retrospectively.

24. In the circumstances, therefore, legal aid was not refused. There was nothing to stop the solicitor or the applicant returning to the Court to seek confirmation of the grant of legal aid, if appropriate, and the applicant was actually legally represented in Court. This ground must fail accordingly.

Disqualification from Driving

25. Kearns P., in his judgment, referred to Conroy v. Attorney General [1965] I.R. 411, which is the leading case on consequential disqualification orders. It is clear from this and subsequent cases that a disqualification order, particularly an ancillary disqualification order under the 1961 Act, which is imposed additionally to any other punishment, is not itself considered as an extra punishment, notwithstanding the terms of the Act. The courts have held – the Supreme Court in Conroy and subsequently the Court of Criminal Appeal in People (Attorney General) v. Poyning (1972) IR 402 that: "disqualifications are not primarily punishments and are not to be so regarded by trial judges." Where the accused person had been sentenced to a jail sentence, and in addition, subjected to a lengthy disqualification from driving in a case of a robbery where a vehicle was used, the Court overturned the lengthy disqualification or at least reduced it substantially on the ground that it was inappropriate to impose, as a sentence for the crime of robbery, a disqualification from driving for such a long period. The recent Court of Appeal decision in DPP v. Sweeney [2014] IECA 5 reaffirmed that an ancillary disqualification order is, in effect, an assessment of the suitability of the person to drive a mechanically-propelled vehicle.

26. In R. v. St. Alban's Crown Court [1981] 2 WLR 681, the Court of Appeal – per Donaldson L.J. – held that where the Crown Court had imposed a sentence which, although within the statutory limits, was so far outside the normal discretionary limits that it amounted to an error of law, certiorari might be granted.

27. The passage from that case that was referred to in Conroy and is cited by Kearns P. at p. 27 and following of his judgment to the effect that the real nature of the disqualification order is that it is essentially a finding of unfitness of the person concerned to hold a driving licence.

28. R. v. North [1971] RTR 366 held that a lifetime ban from driving was bad in principle.

29. The High Court accepted the Director's submission that in order for the applicant to challenge this part of the order successfully, he had to show that it was unreasonable to the extent that it "plainly and unambiguously flies in the face of fundamental reason and common sense" – this is a quotation from State (Keegan) v. Stardust [1986] I.R. 642.

30. The Court held that the duration of the disqualification was a matter to be dealt with on appeal "the order may only be challenged in this Court on the basis that it is so far outside normal parameters of sentencing as to be irrational. There is no evidence that lengthy periods of disqualification are rarely, if ever, imposed so as to provide a concrete basis for the Court to intervene by way of judicial review. There is an effective appeal system in place which the appellant can avail of. To hold otherwise would be an undesirable use of the judicial review process".

31. It was submitted that the 40-year disqualification represents a lifetime ban which is excessive, disproportionate, unreasonable and amounts to an error in law. Such a disqualification is far outside any normal range of sentencing practice in which it was submitted that disqualifications of over 15 years are practically unheard of. Mr. O'Brien's case is that this length of disqualification is so excessive that it represents a jurisdictional error so that judicial review is appropriate. The English cases confirm the appropriateness of judicial review in a case of wholly excessive disqualifications. However, it has to be remembered that the process of appeal available in the neighbouring jurisdiction is relevant on this question.

32. The Director submitted that an appeal is the appropriate course for Mr. O'Brien to pursue. This is not an example of O'Keeffe v. Bord Pleanála unreasonableness. There was material before the respondent to enable him to make a decision on the length of disqualification and the decision he made was made within jurisdiction accordingly. Judicial review is not concerned with the decision, but with the process. Accordingly, this matter is properly the subject of appeal to the Circuit Court.

Discussion

33. On this point the Court takes the view that the 40-year disqualification is unjustifiable and ought to be struck down. It is outside the zone of what might be considered reasonable by any standard. It also offends the underlying legal basis of the disqualification as determined and set out by the Supreme Court in Conroy's case.

34. It would have been within the jurisdiction of the District Court to impose a disqualification for some substantial period based on rational considerations of issues raised by Mr. O'Brien's record. This Court cannot do that so, the disqualification order must fall. That does not mean that the whole conviction is erased, however, because it is an ancillary disqualification that is severable from the sentence which was imposed within jurisdiction. There follows also a period of mandatory disqualification under the Road Traffic Acts. The Court will allow the appeal on this point. If Mr. O'Brien appeals his sentence of imprisonment, it will be open to the judge to consider the ancillary disqualification issue afresh and to impose a more appropriate disqualification, if so minded.

Conviction Record

35. It is alleged that the conviction records an incorrect statutory basis for the offence committed by Mr. O'Brien. It is also claimed that the charge itself was prejudicial by reciting that he had been disqualified. The High Court held that the relevant statutory provisions were expressly referred to and that there was no doubt surrounding the offence of which the applicant was convicted i.e. driving without a valid licence contrary to s. 38(1) of the Road Traffic Act 1961. The fact that the order details that he was driving without a valid licence while disqualified did not render the order void or erroneous and neither did the wording of the charge create any prejudice.

36. It was submitted on Mr. O'Brien's behalf that the High Court was in error in these findings. The relevant statutory provisions are not expressly referred to in the conviction, and in fact incorrect provisions are cited. The written submissions express the point as follows:-

> "Section 38 of the Road Traffic Act 1961 (as substituted by s. 12 of the Road Traffic Act 2006) does not 'provide the offence' as recited. Section 12 of the 2006 Act provides the applicable penalty for driving without a licence. Section 102 of the 1961 Act (as amended) was not substituted by s. 12(a) of the Road Traffic Act 2006. Section 12 does not substitute or amend s. 102. It amends s. 38. Specifically, s. 12(a) amends s. 38 to insert s. 38(2)(a) which sets out the penalties for driving without a licence. Section 12(b) amends s. 38 to insert sub-section (5) which sets out the separate penalty for driving without a licence where the person was, at the time, disqualified from driving. Due to these inaccuracies, the order fails to show jurisdiction."

37. The order convicting and sentencing Mr. O'Brien recites the following:-

> "On 26/7/2012 at N7, Naas, Kildare, a public place in the District Court Area of Naas, being a person who has been convicted of the offence of drink driving and driving with no insurance and disqualified from holding a Driving Licence, did drive a mechanically-propelled vehicle Registration Number 11KE 2607 during the period of the aforementioned disqualification.
>
> Contrary to s. 38 of the Road Traffic Act 1961 (as substituted by s. 12 of the Road Traffic Act 2006) provides the offence. Section 102 of the Road Traffic Act 1961 (as substituted by s. 12(a) of the Road Traffic Act 2006) provides the penalty.
>
> It was adjudged that the said defendant be convicted of the said offence and be imprisoned in the Midlands Prison for the period of four months, commencing 09-May-2013.
>
> It was ordered that the defendant be convicted of the said offence and be disqualified from holding a Driving Licence for a period of 40 years . . ."

38. It was submitted, as in the High Court, that charging the person with an offence of "driving while disqualified" was not only incorrect in law, but was actually prejudicial and in violation of the presumption of innocence.

39. It was submitted that the order of the District Court must itself show jurisdiction. Although it was sufficient in order to show jurisdiction if it merely said contrary to the statute in such case made and provided without any further specification of the legislation the situation was different and jurisdiction was not shown where the order cited an incorrect statutory formula.

Discussion

40. The Court accepts the Director's submission that the argument is without merit. Mr. O'Brien pleaded guilty to the offenses and cannot claim, even remotely, to be in any way prejudiced. Section 38(1) of the Road Traffic Act 1961 makes it an offence to drive a mechanically-propelled vehicle without holding a licence. Section 38(5) of the same Act, as substituted by s. 12 of the Road Traffic

Act 2006, provides that a person who is convicted of an offence under s. 38(1), and who was at the time of that offence disqualified from holding a licence, is subject to a defined penalty. Since the range of available penalties is different, it is essential that the order should record the conviction of driving without a licence. The order of conviction has to be considered and interpreted in a reasonable and pragmatic manner.

41. Error of law on the face of the record is in general a non-jurisdictional error. There is no obligation to quash where the applicant cannot realistically point to any prejudice or detriment.

42. On this point, the Court adopts its observations in the cases of DPP v. Ahern and Joyce (2014/22 COA and 2014/23 COA), which were heard on the same day as this appeal. The judgment deals with the issue of alleged confusion of the crime, as recorded in the conviction.

43. The Court held that "The accused in each case was informed in clear and unambiguous terms of the offence alleged i.e. getting into a mechanically propelled vehicle contrary to s. 113 of the Road Traffic Act 1961. Such a description required the accused and their legal advisers to consider the terms of that section which makes it clear that by virtue of it, the entry into the vehicle was alleged to be without lawful authority or reasonable cause. All the necessary information was furnished to the accused and their legal advisers. No issue was raised by their legal advisers and on foot of the advice furnished by them the accused pleaded guilty. "

44. Furthermore, it stated that: "In my view the charges and the orders which flowed from them comply fully with the prescription of Finlay P. in Sugg's case. The precise offences were set out in clear and unambiguous terns by reference to the statute. They contained such material facts as identified the manner in which the offences were committed, the date upon which they were committed and the place they were committed. The accused could never again be charged with the same offences. They are left with a record of the matter in respect of which they were convicted so as to enable them to ground a plea of autrefois convict were they ever to be charged with the same offences again. "

45. The Court is satisfied that there is no doubt about the crime that the District Court considered and neither is there any doubt about the nature of the crime for which Mr. O'Brien was convicted. In those circumstances, this point also is dismissed.