Neutral Citation [2016] IEHC 699

THE HIGH COURT

2015 No. 663 JR

BETWEEN

STEPHEN FITZPATRICK

APPLICANT

– AND –

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 6th December, 2016.

I. Introduction

1. Mr Fitzpatrick's bail of €100 was estreated by a District Judge on 16th October, 2015, after Mr Fitzpatrick failed to turn up in court. When so doing, the learned District Judge also purported to impose a sentence of imprisonment of 21 days, notwithstanding that under the applicable legislation and rules the appropriate sentence in default of payment was 15 days.(a) The sentence was therefore in excess of jurisdiction and the within judicial review proceedings have ensued.

(a) Section 9(1) of the Bail Act 1997 provides that where an accused person fails to appear in accordance with a bail recognisance, the court may order that the monies conditioned to be paid under the recognisance be estreated in such amount and within such period as the court thinks fit. Section 9(12) of the Act of 1997 provides that if this estreatment order is not complied with, a "*warrant of committal of the person…for such non-compliance shall be issued by the court*". Section 9(12) goes on to provide that, for the purpose of determining the period of imprisonment to be served by a person who defaults on an estreatment order, the committal warrant "*shall be treated as if it were a warrant for imprisonment for the non-payment of a fine equivalent to the amount estreated*" under s.9(1). A similar provision is included in O.27, r.10 of the District Court Rules, which provides that a warrant of committal under s.9(12) of the Act of 1997 shall be in a specified form and that the period of imprisonment to be specified in the warrant shall be identified in accordance with a table in O.23, r.7 setting out applicable default periods for non-payment of a fine. The permissible periods that may be imposed for default on an estreatment order are set out in statute and in the District Court Rules. Section 2 of the Courts Act (No. 2) Act 1986 provides that where a fine is imposed on summary conviction, the court may order that in default of payment the person liable to pay the fine shall be imprisoned for a term "*not exceeding*" various periods set out in a table, extending to 15 days when it comes to the amount in issue in the within proceedings. In a similar vein, O.23, r.7 of the District Court Rules provides that, *inter alia*, the following default period for non-payment of fines shall apply: 15 days for a fine exceeding €63.49 but not exceeding €317.43. (Here the amount in issue was €100).

2. Prior to the hearing of the within proceedings, the DPP wrote to Mr Fitzpatrick and indicated that his application for an order of *certiorari* would not be opposed if no order for costs was sought by Mr Fitzpatrick. This offer was not accepted. So the dispute between the parties continued. And, on the day of hearing, notwithstanding that the DPP still indicated that she was satisfied to consent to the order for *certiorari* sought by Mr Fitzpatrick, arguments as to:

(i) the so-called 'slip rule';

(ii) whether defence counsel should have made certain submissions to the learned District Judge;

(iii) the fact that there has never been any explanation from Mr Fitzpatrick as to his absence from the District Court;

(iv) the import of applicable case-law; and

(v) whether or not the court should award costs to Mr Fitzpatrick,

were all touched upon by the DPP, subject to the overriding caveat that the DPP continued not to accept that the within application required to be heard. The DPP even participated in the proceedings to the extent that certain elements of the affidavit evidence which had been elided over when read out by counsel for Mr Fitzpatrick (in order not to protract the hearing unduly, not from any other motive) ought to be read out more fully.

3. Had the DPP come to court and indicated that she remained satisfied to consent to the order of *certiorari* and done nothing or little more, the court considers that it would have been bound by the observation of Denham C.J. in *Miley v. EAT* [2016] IESC 20, para.58, that "*It is only if neither party seeks to stand over the conduct or ruling, that the applicant will only succeed in the judicial review but not recover the costs of so doing. Those costs can only amount to the drafting of the application and the ex parte application for leave, and the uncontested application for judicial review."* The Chief Justice's observations in this regard are grounded on a long line of judgments, including that of Palles C.B., perhaps the most distinguished of our pre-Independence judges, who observed in *R. (King) v. Justices of Londonderry* (1912) 46 I.L.T.R. 105, that "[A]*s a rule magistrates ought not to be obliged to pay costs unless they were acting in some way that was not bona fide, or unless they took it upon themselves to put forward and support a case that was wrong in point of law."*

4. The within proceedings do not come within the ambit of the above-quoted observations of the Chief Justice in *Miley*. Here, the DPP has come to court and asserted in effect that 'I am not objecting to the order of *certiorari*, but here are all kinds of objection, but I am not objecting, so the decision in *Miley* applies'. The court is not certain what the precise logical import of the foregoing is. It does not seem to be quite not standing over an order, and its practical consequence was that the court was not presented in the within application with the near 'non-event' that Denham C.J. appears to contemplate in *Miley*. Instead, there was sharp argument between counsel at hearing, and the court has been called upon, and of course is satisfied, to consider and determine issues in a much more comprehensive manner than a typical consent application where counsel for the DPP indicates, for example at a list hearing, that an order for *certiorari* is not being opposed and no order for costs should issue.

5. In passing, the court notes that even in the last-mentioned instance, judicial review remains a discretionary relief. That a particular relief will issue from the court is not a matter for previous private agreement. So even where the different parties to an application are agreed that an order of *certiorari* ought to issue, a court may well disagree. But, in practice, when a great officer of state, such

as the DPP, consents to an application seeking an order of *certiorari* in respect of a sentence imposed in excess of jurisdiction, such order will typically issue without much a-do, and the above-mentioned rule as to costs identified in *Miley* will apply. Here, however, the DPP went much further, the court has been required to do much more, the within application cannot properly be described as having been a typical (and typically brief) consent application. The court might, for example, have accepted what the DPP had to say, and did say, as regards the so-called 'slip rule'. Consequently it is open to the court to make an order for costs against the DPP.

II. The So-Called 'Slip Rule'

6. The DPP indicated that a matter such as that now presenting ought to have been the subject of an application for correction under O.12, r.17 of the District Court Rules, the so-called 'slip rule' whereby "*Clerical mistakes in decrees, orders or warrants, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court*". However, there is no evidence to suggest that what happened in the within case was a 'clerical mistake' or an "*accidental slip or omission*". Rather, the evidence is that the learned District Judge deliberately, and following due consideration of the matters at hand, erroneously imposed a sentence in excess of jurisdiction. That is not a 'clerical mistake'. Nor is it an "*accidental slip or omission*". It is a jurisdictional matter that is appropriately the subject of a judicial review application. And it has never been, and is not, a pre-requisite to the bringing of a judicial review application concerning the actions of a District Judge that the offended party must first make application in the District Court to see whether the alleged error complained of can be cured pursuant to the 'slip rule'.

7. There may, of course, be instances in which the proper characterisation of an impugned event is not as clear-cut as it is in the within proceedings. In such instances, as in all others, whether relief is to be sought by an aggrieved applicant pursuant to O.12, r.17, or by way of judicial review, will likely come down to the expert view of advising solicitors and barristers. Any especial excess of zeal in seeking relief by way of judicial review, rather than pursuant to O.12, r.17, can doubtless be reflected in any costs order that issues at the end of the day – though the judge before whom a contested judicial review application is brought will doubtless always be mindful that there can be instances where the very best of legal advisors can reasonably elect to proceed down one route when, with the benefit of hindsight, and true hindsight is only possible after a judgment of the reviewing court issues, a different course of action can be seen to have been preferable. But all this is *obiter* in the context of the within proceedings. Here, the view of Mr Fitzpatrick's legal team as to how to proceed, being by way of application for judicial review and not pursuant to O.12, r.17, was entirely correct.

III. Counsel for the Defence Should Have Made Submissions to the District Judge?

8. The DPP indicated that counsel for Mr Fitzpatrick, who was present in the District Court when the learned District Judge erred, ought to have drawn the attention of the learned District Judge to the error arising. Mr Bradbury, the solicitor for Mr Fitzpatrick, has addressed this issue in his affidavit evidence, averring as follows in this regard:

> *"I accept that counsel instructed by my office did not inform* [the learned District Judge]…*that she was acting in an* ultra vires *manner at the time when she was making the estreatment order. I say however that this was not any sort of intentional or calculated manoueuvre on the part of counsel. Instead, I am informed by counsel that the reason that no objection was raised at the time was due to a lack of clarity over the bail bond which the Applicant was bound by. In the absence of this crucial information, counsel did not know at the time that an* ultra vires *order was being made and had no basis for telling* [the learned District Judge]…*that she was acting unlawfully. I say that, in those circumstances, counsel instructed by my office cannot be expected to have taken any further steps, and it would have been entirely inappropriate for counsel to propose to the District Court judge that she was acting* ultra vires.
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> *….It is noteworthy in this regard that* [the] *District Judge did not announce the value of the bail bond which was being estreated at the time that she made the estreatment order at issue, but simply stated that an estreatment order was to be made, with one month to pay and 21 days' imprisonment in default. Therefore, the District Court Judge did not provide counsel with the necessary information to conclude that an ultra vires action was being taken."*

9. The above averments give a perfectly proper and logical explanation as to why nobody present in the District Court when the impugned order was made, be it the legal team for the defendant, or indeed the legal team for the DPP, was in a position to submit to the learned District Judge that she might be, as indeed she was, imposing a sentence in excess of jurisdiction.

IV. No Explanation from Mr Fitzpatrick

10. The DPP noted that no explanation has been forthcoming from Mr Fitzpatrick as to why he did not turn up in court on 16th October, 2015. However, any such explanation is irrelevant to (i) the issue of whether the learned District Judge acted within jurisdiction in doing as she did, and (ii) any costs application made following a contested judicial review application brought consequent upon what was perceived to be, and was, a judicially reviewable act done in excess of jurisdiction.

V. Conclusion

11. The within judicial review application has been brought by Mr Fitzpatrick. The court will grant the order of *certiorari* and declaration sought. When it comes to costs the court has explained above why it considers this case to come outside the approach endorsed by Denham C.J. for the Supreme Court in *Miley*. The court therefore sees nothing that would justify its declining to order costs in favour of Mr Fitzpatrick, and so will make such order.