Neutral Citation Number: [2011] IEHC 330

THE HIGH COURT

2010 1065 JR

BETWEEN

JASON O'BRIEN

APPLICANT

AND

DISTRICT JUDGE JOHN COUGHLAN

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Kearns P. delivered the 29th day of July, 2011

This is an application for judicial review in which the applicant seeks an order of *certiorari* to quash the conviction and penalty imposed on him *in absentia* by the first-named respondent at Tallaght District Court on the 22nd July, 2010. This order is sought on the grounds that, by failing to either adjourn the case or to issue a bench warrant to compel the presence of the applicant, the district court judge deprived the applicant of his right to fair procedures under both natural and constitutional law, and in so doing, acted in excess of jurisdiction.

BACKGROUND FACTS

The facts leading to the conviction of the applicant arise from a traffic offence on the 21st January, 2010 when the applicant failed to produce his driving licence and insurance after being stopped by Detective Garda Kieran McGrath. The applicant was subsequently prosecuted by way of summons for this as well as a number of road traffic offences, and the case was first listed for mention on the 31st April, 2010. The applicant did not appear in court on this date, and the case was adjourned to the 4th June, 2010. The applicant was present in court on this date, and a trial date was fixed for the 22nd July, 2010.

On the date of trial, the case was brought before Judge Coughlan, and the applicant did not appear; no explanation for his absence was given. Mr. O'Donovan, solicitor for the applicant, made applications, first for an adjournment and, second for the issue of a bench warrant, but both applications were refused and the case proceeded to trial in the applicant's absence. Following the recital of Detective Garda McGrath's evidence and Mr. O'Donovan's legal submissions, Judge Coughlan proceeded to summarily convict the applicant of the offences in question.

At this juncture, counsel for the applicant made a further application for issuance of a bench warrant, requesting that sentence be deferred pending its execution. This application was also denied, and Judge Coughlan proceeded to impose upon the applicant a sentence of five months imprisonment and a disqualification from driving for forty years.

THE APPLICANT'S SUBMISSIONS

Counsel on behalf of the applicant submits that by proceeding to trial and to sentence in the applicant's absence, Judge Coughlan deprived the applicant of his natural and constitutional right to fair and just procedures. Counsel refers to the judgment of Murphy J. in *Lawlor v. Hogan* [1993] I.L.R.M. 606, outlining the applicable principles:

> *"1. An accused has a fundamental constitutional right to be present at and to follow the proceedings against him.*
>
> *2. In so far as the judicial process in criminal matters expressly requires matters to be dealt with by or in relation to the individuals accused, clearly he must be present to enable these functions to be performed.*
>
> *3. If a trial judge is satisfied that the accused has consciously decided to absent himself for 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."*

In respect of Murphy J.'s third point, the applicant has sworn in affidavit taken the 13th July, 2011 that he was not present at trial because he had mistakenly believed that his case had been adjourned to the following day, the 23rd July, 2010. Accordingly, the applicant asserted that his absence resulted purely from human error, and was not a conscious or deliberate effort to evade the legal proceedings against him. As no evidence was adduced to indicate that the applicant was in fact deliberately absenting himself from the proceedings, counsel submits that it was improper for the judge to proceed without further inquiry into the circumstances surrounding the absence, particularly to twice deny his solicitor's explicit requests to issue a bench warrant compelling his attendance.

Counsel further submitted that once Judge Coughlan took the view that a custodial sentence should be imposed, particularly in respect of an offence that does not usually warrant a prison sentence, the case should at least have been adjourned at that point so that the applicant could be afforded an opportunity to be heard and follow the proceedings against him in accordance with due process. In support of this proposition, counsel for the applicant cited the judgment of Geoghegan J. in *Brennan v. Windle* [2003] 3 I.R. 494, addressing the issue of imposing a prison sentence in an individual's absence at 509:

> *"Once the first respondent would have had in mind to impose a prison sentence and particularly a sentence as long as*

four months and, particularly also in the circumstances that the offence in question would not invariably attract a prison sentence, the first respondent failed in my opinion to afford the applicant due process and/or fair procedures or natural/constitutional justice."

In the same case Hardiman J. concurred with this view, stating at 502:

"Apart altogether from the question of the District Judge's power to enter on the hearing at all in the absence of proofs of service, I agree with the judgment of Geoghegan J. that 'once there was an intention to impose a prison sentence … the first respondent failed to afford the applicant due process or fair procedures or natural or constitutional justice' in failing to secure the attendance of the applicant and hear him before proceeding to impose the sentence."

Accordingly, the applicant contended that, at the very least, the second application for the issue of a bench warrant should have been granted so that the applicant would be afforded an opportunity to be heard prior to the imposition of any sentence upon him. Counsel for the applicant therefore argued that Judge Coughlan provided no rational basis or explanation for proceeding to both trial and sentence in the applicant's absence, and that such an action constituted a fundamental defect in procedure contrary to natural and constitutional justice. He contended that the judge could only have validly acted in such a manner had he determined that the applicant was deliberately and consciously absenting himself from the court, and such a determination was not made or even addressed. Further, counsel concludes that the remedy of *certiorari*, rather than direct appeal, was appropriate as Judge Coughlan had acted in explicit disregard of the law and principles of fair procedure; counsel contended that an appeal should not proceed as if nothing untoward and procedurally defective had occurred at the trial level.

THE RESPONDENT'S SUBMISSIONS

Counsel for the first-named respondent, Judge Coughlan, submitted that the judge acted in accordance with fair procedures and with the appropriate discretion afforded to a district court judge. He contended that, based on the above-quoted factors set forth by Murphy J. in *Hogan*, the judge is given explicit discretion to determine whether he believes that the defendant consciously failed to appear, and to proceed in such circumstances where no alternative explanation was offered for the applicant's absence. As the applicant had been in court many times previously and thus was familiar with court procedures, the judge was entitled to conclude that his absence on this occasion was a conscious choice. By deliberately absenting himself from the proceedings, the applicant therefore deprived himself of any right to deferral of sentence; accordingly, his trial and sentence *in absentia* was fair and in accordance with due process.

In support of this contention, counsel referred to the judgment of Lord Bingham of Cornhill in *R. v. Jones (Anthony)* [2003] 1 A.C. 1, stating:

"If a criminal defendant of full age and sound mind, with full knowledge of a forthcoming trial, voluntarily absents himself, there is no reason in principle why his decision to violate his obligation to appear and not to exercise his right to appear should have the automatic effect of suspending the criminal proceedings against him until such time, if ever, as he chooses to surrender himself or is apprehended."

Counsel also relied upon the judgment of Peart J. in *Callaghan v. Governor of Mountjoy Prison* [2007] IEHC 294, in which he stated at pages 7-8:

"In relation to submissions by Mr. O'Higgins that it is incumbent on the District Judge to sentence the offender and not the offence, and that for this reason it is necessary that the applicant be present so that possible mitigating factors can be taken into account, and that his attendance should have been assured in some way by the District Judge by the issue of a bench warrant, I do not agree that this is a necessary step in all cases. In the present case I accept the evidence that the District Judge called for evidence of previous convictions. When imposing a sentence of three months imprisonment on the insurance summonses and taking the remainder into account, in the context of nine previous convictions, three of which are for the same offence of driving without insurance, the District Judge cannot be considered to have imposed a sentence which was not justified. He has sentenced the offender, namely a person who has been found guilty of the same offences on three previous occasions. If the applicant has chosen not to be present for his case, having been given a reasonable opportunity of being present, the District Judge is entitled to presume that there are no mitigating factors or other circumstances to be put forward by way of mitigation before penalty is imposed. If following the imposition of such a penalty the applicant still considered it to be excessive he retained at all times his entitlement to appeal the harshness of the penalty. It is another matter altogether that the imposition of sentence in this way has given rise to an unlawful detention."

In this case, the applicant had fifty-four previous convictions for related traffic offences, as exhibited in Detective Garda Kieran McGrath's affidavit sworn the 23rd of February 2011. Thus, counsel submitted that Judge Coughlan was justified in proceeding and imposing sentence *in absentia* where the applicant had numerous previous convictions on similar charges, and the applicant had been present in court when the trial date was fixed.

Counsel for the first-named respondent additionally referenced this passage in submitting that, notwithstanding the propriety of Judge Coughlan's actions, *certiorari* was not the appropriate remedy in this case, and that counsel for the applicant should have initiated an appeal in the Circuit Court. Counsel sought to find support for this conclusion based on my recent judgment in *Doyle v. Connellan* [2010] IEHC 287, where I stated:

"I am quite satisfied that the present application for relief cannot succeed. In my view the appropriate remedy for the applicant was to proceed by way of appeal as this case manifestly falls to be considered as one which revolves entirely around the question of the adequacy of the evidence adduced in the District Court. Where that is the true position, I do not believe a judicial review remedy should be granted save in cases where the proceedings are fundamentally flawed by reason of some inherent unfairness or impropriety in the hearing taken in its entirety."

The following passage from the judgment of Hederman J. in *Sweeney v. Brophy* [1993] 2 I.R. 202 was also cited as follows at page 211:

"In my judgment certiorari is an appropriate remedy to quash not only a conviction bad on its face or where a court or tribunal acts without or in excess of jurisdiction but also where it acts apparently within jurisdiction but where the proceedings are so fundamentally flawed as to deprive an accused of a trial in due course of law. I take this opportunity of emphasising that certiorari is not appropriate to a routine mishap which may befall any trial; the correct remedy in that circumstance is by way of appeal."

Accordingly, the first-named respondent argued that the judge was entitled to proceed to trial and sentence in the absence of the applicant, and, notwithstanding that finding, there was in any event inadequate evidence to warrant a remedy by way of judicial review; the appropriate course for the applicant in this case was to exercise his right of appeal to the Circuit Court.

DECISION
Following the disposal of this matter in the District Court, the applicant has, in the context of the present proceedings, finally advanced a reason to explain his non attendance in Tallaght District Court on the 22nd July, 2010. He has in an affidavit sworn that he was not present for his trial because he had mistakenly believed that his case had been adjourned to the following day, namely, the 23rd July, 2010. No evidence in contradiction has been offered by or on behalf of the respondent, no doubt because it is a contention which is incapable of being investigated and rebutted other than by an expression of disbelief having regard to the applicant's familiarity with court procedures. In this context it is to be noted that the applicant has no less than 54 previous convictions for road traffic offences, and is thus an unlikely candidate to have mistaken the upcoming date of a court hearing which was announced in his presence in court.

It is regrettable aspect of the administration of justice in modern times that both prosecuting authorities and the courts are expected to at every juncture to facilitate defendants who themselves neglect or decline to co-operate in the procedural requirements which require to be observed by both prosecution and defence so as to permit the criminal justice system to function effectively. It is thus by no means uncommon to hear that members of An Garda Síochána are required to devote a great deal of time and energy to the execution of bench warrants where persons remanded on bail fail to turn up for designated sittings or simply ignore the process altogether. It is often later argued or contended that it was an injustice for the court to proceed further in the absence of the person accused or charged with a particular offence.

The applicant in this case was present in court on the date when his trial date was fixed. I therefore reject the purported explanation offered now in the context of the present application to explain non-attendance.

I think in the circumstances the District Judge was entitled to proceed with the trial and reach a conclusion as to guilt or innocence.

However, I am satisfied a different consideration must arise where the District Judge then intends to impose a custodial sentence which is something more than a short term custodial sentence. A sentence of five months imprisonment must be considered as a sentence of substance. That being so, this Court is constrained to follow the decision of the Supreme Court in *Brennan v. Windle* [2003] 3 I.R. 494 which stated firmly that where the sentencing judge has in mind to impose a prison sentence of some length in circumstances where the offence in question would not invariably attract a prison sentence, the failure to at least to ascertain if there is a *bona fide* reason for non-attendance or to make some effort to secure the attendance of the applicant and hear him before proceeding to impose the sentence does amount to a breach of fair procedures and a breach of the requirements of constitutional justice.

While a brief custodial sentence may not give rise to such a requirement, I believe such a requirement does arise in this case because of the significant sentence the District Judge had in mind to impose. Accordingly, I would uphold the applicant's submission in that, having found the applicant guilty, the respondent should, prior to the imposition of sentence, have either adjourned the case or issued a bench warrant to compel the presence of the applicant before imposing sentence.

I will discuss with counsel for the respective parties the nature of the appropriate order to be made in the light of these findings.