Neutral Citation Number: [2014] IEHC 116

THE HIGH COURT

[2013 No. 667 J.R.]

BETWEEN

PATRICK QUILLIGAN

APPLICANT

AND

DISTRICT JUDGE KEVIN KILRANE AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on the 10th March, 2014

1. Under what circumstances is a District Judge entitled to proceed to convict an accused of an offence in his absence and then to impose a significant prison sentence? This, in essence, is the issue which arises in the present judicial review proceedings.

2. On 8th February, 2012, Garda Seamus Mimnagh, a Garda attached to Mohill Garda Station in Co. Leitrim received a telephone call regarding an attempted burglary at a house in Ballinamore. He travelled to the scene with Garda Padraig Higgins and spoke to the injured party. The householder told the Gardaí that he had disturbed a number of men at his home and that they had fled in a silver Golf car bearing the initial registration numbers 09 TS.

3. Having consulted the Garda information retrieval system, it appeared that a car of that description was in the hands of persons with criminal records for this type of offence. Garda Mimnagh then received a message that a car answering this description was in the vicinity of Carrigallen. They then drove in a Garda patrol car to that location, arriving there at 8.10pm. They saw a silver Golf parked on the left hand side of the road.

4. The silver Golf then immediately took off and crossed the road. Both Gardaí saw the occupant in the full glare of the headlights as the car crossed the road and based on the information available to them (including Garda photographs), they identified him as the present applicant. When the silver Golf was in the centre of the road, it suddenly did a handbrake turn and the front of the car came towards the front of the patrol car. Garda Mimnagh swerved to avoid a collision. The patrol car was damaged and the left front wheel suffered a puncture from impact with a stone in the ditch. The silver car then took off at high speed in the direction of Aughavas.

5. The Gardai then circulated details of the silver car and then changed the wheel of their car. They received a message that the vehicle was now in the vicinity of Drumlish. Garda Higgins and Garda Mimnagh, along with other Gardai from Granard, found the car at Drumlish. The occupants took off through the fields. Despite an extensive Garda search and chase, the suspects were not located. It is, nevertheless, only proper that the efficiency, dedication and, indeed, conspicuous bravery shown by Garda Mimnagh, Garda Higgins and their colleagues should be acknowledged.

6. The silver car was taken to Longford Garda station where a full technical examination was undertaken. Although no new evidence was located, it transpired that the car had false number plates and it was registered under a false name and address.

7. Three summons were issued against the applicant were hand delivered to an address in Tallaght, Dublin 24 on 7th November, 2012. The uncontradicted evidence of the applicant, however, is that he never resided at that address and that he never received any such notification. As it happens, the applicant resides at an address in Rathangan, Co. Kildare.

8. The case was first listed at Carrick-on-Shannon on 20th November, 2012, when it was adjourned to 15th January, 2013. On that date District Judge Kilraine directed that the applicant be notified of the new date for the hearing, 19th February, 2013, and Garda Mimnagh then wrote to the eight addresses of the applicant of which the Gardai were aware. Only one of the letters to those addresses were returned on the basis that the applicant did not live at that address.

9. The applicant says that he did not reside at that time at any of these addresses and that he did not receive any of these letters. He nevertheless admits that while he was "technically" using the one of these addresses (26 Sundale Avenue, Tallaght, Dublin 24), he maintains that he was not residing there as he was on the road travelling. He further asserts that he not receive notification of any of the court dates.

10. The applicant was nevertheless not present at the hearing in the District Court on the 19th February 2013. Evidence was then given of the correspondence which had been sent to the applicant at the various addresses of which the Gardai were then aware, although the applicant was never served at his Kildare address. The case then proceeded in the applicant's absence. The applicant was subsequently convicted by District Judge Kilraine of dangerous driving for which he imposed a sentence of five months' imprisonment and an order disqualifying him from driving for a four year period.

11. On 15th August, 2013, the applicant was arrested by Gardaí at his home and taken to Castlerea Prison to serve out his sentence. The applicant protested that he had no notice of the earlier proceedings or of the fact that he had been convicted in his absence. He maintained that another person had wrongly used his name and identity. Following an application to this Court for an inquiry under Article 40.4.2 of the Constitution into the legality of his detention, on the following day, 16th August, O'Malley J. directed his release from custody, as the Governor indicated that he was not standing over the detention.

12. Following his release from custody by order of this Court, the applicant assumed – not unreasonably – that he was free to drive, as he says that he was unaware of any penalty other than the five months' imprisonment. Being unaware of that disqualification he then drove to a fair in Northern Ireland and while driving there he was arrested for driving without a licence. It appears that the prosecution case in the Northern Irish proceedings is premised on the assumption that there is a valid order from this State which has

the effect of disqualifying the applicant from driving.

13. The applicant was held in custody overnight and then released on bail. He has been advised by his solicitor in Northern Ireland that his chances of defending those charges will rest in major part on whether he succeeds in the present challenge to the validity of the conviction imposed by the District Court in February, 2013. It is to the validity of that conviction to which we may now turn.

Whether the conviction was validly imposed?

14. Proper and timely notice of criminal proceedings is a constitutional fundamental reflecting values embodied in Article 34.1, Article 38.1 and Article 40.3.1 of the Constitution. Conviction without due advance notice could not be said to be amount to trial in "due course" of law for the purposes of Article 38.1: see generally *Lawlor v. Hogan* [1993] I.L.R.M. 606 and *Brennan v. Windle* [2003] 3 I.R. 494.

15. Of course, as these and other authorities make clear, this is not quite the same thing as saying that the accused must necessarily be present at all stages of the trial. Different considerations apply entirely where the accused has such notice, but nevertheless elects either not to attend the hearing or to absent himself from his trial.

16. In the present case the applicant's averment that he was "technically" using one of the addresses to which the Gardaí had sent a notification is a somewhat curious one. One might indeed think the fact that the letter which was sent to the Sundale Avenue address was never returned was a telling one. It nevertheless appears to be accepted that the applicant is no longer living there and that he was, in any event, on the road for this period. In these circumstances, having regard to the totality of the evidence, I find myself driven to the conclusion that the applicant had not, in fact, received any such advance notification, or, at least, that such cannot satisfactorily be established.

17. These matters were most recently considered by Kearns P. in *O'Brien v. Coughlan* [2011] IEHC 330. In that case the applicant was convicted of driving without insurance and was sentenced to five months' imprisonment by the District Court. He had, however, been convicted in his absence, although he had been present at earlier court dates and was present when the hearing date was fixed. Noting that the applicant had some 54 previous convictions for road traffic offences, Kearns P. rejected the applicant's contention that he had been confused regarding the trial date and it was held that he had appropriate notice of the proceedings.

18. Kearns P. nonetheless held that the District Judge should not have proceeded to sentence the applicant in his absence following conviction:

"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."

19. In my view, the present case is indistinguishable from *O'Brien*, in that in both instances the accused received a significant custodial sentence in their absence. Indeed, if anything, the case here is stronger, since in *O'Brien* the applicant had unquestionably received due notice of the proceedings and had been present at earlier stages in the proceedings, whereas even this was not the case in the present proceedings. Even if (contrary to my own view) the applicant in the present case had in fact received proper notice of the proceedings, it follows that in the light of *O'Brien* the District Judge could not have proceeded to impose a substantial sentence of this kind in his absence. On any view, therefore, the present conviction cannot be allowed to stand.

Section 22(6) of the Courts Act 1991

20. The respondent maintains, however, that the applicant has available to him an alternative remedy, namely, an application to the District Court under s. 22(6) of the Courts Act 1991 ("the 1991 Act"). This sub-section provides:

> "(6) (a) Where a summons has been issued under section 11 (2) of the Act of 1851 or section 1 of the Act of 1986 and the District Court has proceeded to hear the complaint or accusation to which the summons relates, the person to whom the summons is directed may, if he did not receive notice of the summons or of the hearing to which the summons relates, within 21 days after the said summons or hearing comes to his notice or such further period as the District Court may, having regard to the circumstances, allow, apply to the District Court to have the proceedings set aside.
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> (b) Notice of an application under paragraph (a) of this subsection shall—
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> (i) be lodged with the District Court clerk for the District Court area in which the hearing to which the summons relates has taken place,
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> (ii) be in the form prescribed by rules of court,
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> (iii) state that the applicant did not receive notice of the summons or of the hearing to which the summons relates until a time specified in the notice of the said application , being a time after the commencement of the hearing to which the summons relates, and the hearing of the application shall not take place before the expiration of a period of 21 days from the date of such lodgment as aforesaid or such shorter period as the District Court may allow.

> (c) A person who, in connection with an application under this subsection, makes a statement that he knows to be false or misleading in a material respect shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £500 or to 3 months imprisonment or to both."

21. Section 22(7) further provides:

> "(7) The District Court may, on the hearing of an application under subsection (6) of this section, grant or refuse to grant the application and may direct that the complaint or accusation to which it relates be heard again at such time and place as the Court may direct."

22. The respondents essentially contend that the applicant could – and should – have availed of this remedy which, it is suggested, would have amply dealt with the underlying complaint of conviction in his absence.

23. It is true that there may well be instances where recourse to this sub-section would be appropriate. This might be especially the case where the conviction was a routine one which did not involve a custodial sentence.

24. The present case does not, however, fit into that category. In the first place, the applicant received a custodial sentence – namely, five months – which was significant. Second, as the events of August 2013 showed, the applicant was in continuing jeopardy of being imprisoned. In these circumstances, it would be only natural that the applicant would come to this Court which has the power to grant interim relief in respect of the operation of the custodial sentence, whereas no such power is given to the District Court under s. 22(6) of the 1991 Act.

25. Third, and perhaps most crucially, what occurred here amounted to a clear breach of the applicant's procedural entitlements under Article 38.1 to timely and due notice of the hearing. In cases of that kind, it is well established that the existence of a right of appeal or, indeed, an alternative remedy such as s. 22(6), cannot deprive an applicant of his right to an order of certiorari. As Murray J. observed in *Nevin v. Crowley* [2000] 1 I.R. 113, 118:

> "Where a trial, whether summary or on indictment, has been conducted in such a way as to be in breach of a fundamental principle of constitutional justice, the mere existence of a right of appeal cannot be an obstacle to the granting of an order of *certiorari."*

26. It follows, therefore, that the existence of an alternative remedy of this kind cannot deprive the applicant of the relief to which he is otherwise entitled.

Conclusions

27. For the reasons just stated, therefore, I find myself obliged to quash the conviction which was imposed on the applicant in this case.