Neutral Citation Number: [2008] IEHC 416

THE HIGH COURT
JUDICIAL REVIEW

2007 1656 JR

BETWEEN

ZIVAS FITZGERALD

APPLICANT

AND
JUDGE JOHN O'NEILL AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

Judgment of Ms. Justice Clark delivered on the 9th day of December 2008.

1. This case originally came before the court as one of *certiorari* where the applicant sought to quash the order of conviction and sentence imposed by the first respondent on the 11th June, 2007. The issue was then resolved between the parties, who agreed that the decision should properly be quashed, and the matter which remained to be determined was whether the case should be remitted for a fresh hearing or treated as an acquittal by this Court.

2. By way of background, the applicant was arrested under s. 49(8) of the Road Traffic Act 1961, as inserted by s.10 of the Road Traffic Act 1994, brought to the garda station and required to exhale into an apparatus for determining the concentration of alcohol in her breath under s. 13 (1) (a) of the Road Traffic Act 1994. She did not provide a sample and was charged with refusing or failing to comply with such request.

3. The applicant pleaded not guilty and the matter came on for trial before the learned Judge O'Neill on the 18th October, 2007. At the end of the prosecution case, counsel for the applicant made an application for a direction to acquit raising three separate matters which he argued. The judge found against the applicant without giving reasons for his decision. The applicant then went into evidence, calling her medical practitioner who gave evidence of her condition of a chest infection on the day of the arrest. The applicant herself gave evidence of an inability to provide a sufficient quantity of her breath and her view that she had not been given sufficient time to provide the specimen.

4. At the conclusion of the case, counsel for the applicant indicated his intention to make additional legal submissions but was prevented from doing so by the judge saying "I am convicting your client." The applicant was convicted and disqualified from driving for a period of four years with a fine of €600.00.

5. On the 10th December, 2007, the applicant was granted leave to apply for judicial review for an order of *certiorari* quashing the order of conviction and sentence in respect of the applicant. However, the issue which came on before me was whether the prosecution of the applicant's case should be remitted to the District Court for a re-hearing before a new judge.

6. Ms. Siobhan Ni Chulachain BL on behalf of the Director of Public Prosecution urges that this was a case where no valid hearing had taken place and thus the adjudication was void and a void decision is no bar to a further hearing. She argued that this was a case where the District Judge had full jurisdiction in the case but strayed outside of this jurisdiction once he failed to conduct the trial in accordance with the principles of natural justice. The conviction and sentence were a legal nullity and the defendant cannot plead *autrefois convict* nor could she argue that the hearing before me could, if successful, amount to an acquittal. She relies on the decisions of the Supreme Court of *O'Mahony v. Ballagh* [2002] 2 I.R. 410 and *The State (Tynan) v. Keane* [1968] 1 I.R. 348 where *certiorari* was granted but the cases were remitted for a re-hearing.

7. In *O'Mahony*, the presiding judge failed to address the submissions of defence counsel in his decision or to give reasons for his decision. It was held that although the Judge conducted the case with dignity and propriety, his failure to address the submissions "fell into an unconstitutionality" . On that basis, the Supreme Court held that the correct outcome would be to remit the case back to the District Court for re-hearing. By way of contrast, *Tynan* was a case where there was no jurisdiction to hear the case as the accused was not present for the trial. The accused was deemed never to have been in jeopardy and his case was remitted for a rehearing.

8. The Court was referred by both parties to a decision of Barron J. in *Singh v. District Justice Ruane* [1989] I.R. 610 where it was held that when ordering remittal to the District Court, the basic question to be considered in each case is whether there is jurisdiction to make the particular adjudication. Where the adjudication is made in excess of, or without, jurisdiction it is void *ab initio* and an order of *certiorari* made on such grounds cannot establish a plea of *autrefois acquit* and therefore there could be no objection to the matter being remitted for determination.

9. The applicant's case is that she was an accused person appearing before a court of competent jurisdiction in peril of conviction and was indeed convicted. She argues that because the lawful jurisdiction of the court was vitiated by a breach of natural justice and fair procedures and by impropriety that the quashing of the order by *certiorari* effects an acquittal and she therefore should not have to submit to the perils of a second prosecution with a re-run of the evidence.

Decision

10. The problems which face this Court have been considered at length in an admirable decision of McKechnie J. in *Stephens v. Connellan* [2002] 4 I.R. 321 where he stated at p.358;

> "It is not altogether easy to bring together a set of principles which emerge from the above cases and indeed from others also on this topic".

11. He attempted to analyse, as many judges before have done, the difficult question of the consequences of an order of *certiorari* quashing a conviction and whether and when it is appropriate to remit the case for re-hearing. I share the difficulties expressed by McKechnie J with the concept that in some cases of *certiorari*, a convicted person can plead *autrefois acquit* and prohibit a further trial while in others the applicants are deemed never to have been in peril, on the basis that the court had no jurisdiction, and face a retrial.

12. It seems to me that the problem may well arise in the use of the words *autrefois convict* and acquit which generally refer to the legal defence of a previous verdict in the same matter. The use of the terms in *certiorari* appear to confuse and come perilously close to creating a legal fiction which surely has no place in modern criminal law. Although the law on the subject has been examined and reduced to principles on many occasions, the frequency with which the same issues arise on judicial review are an indication that

there is no general clarity or predictable application of the principles. The vexing question of what happens to the prosecution of a charge where the conviction is quashed as being in excess of jurisdiction continues.

13. Mr. Feichin McDonagh S.C., on behalf of the applicant, described the law in this area as somewhat arcane. I agree that the concepts are difficult as there is a lack of consistency or logic in some of the judgments opened before me and which counsel very fairly agreed would present the court with a difficulty.

14. The review of the various decisions on the subject of jurisdiction outlined in *Stephens v. Connellan* seems to make no distinction between the effect of an order of a court or tribunal which had no jurisdiction and the court or tribunal which had jurisdiction but in some way exceeds that jurisdiction. Both orders are viewed as being nullities; the convicted person must face a fresh trial and cannot rely on the previous conviction to seek prohibition nor can he rely on the order of *certiorari* as an acquittal. On the other hand, it seems that if a court is acting within jurisdiction but because of an unfairness arising from the conduct of the trial, an applicant for *certiorari* may argue that the impropriety was made within jurisdiction with the effect that the accused person was in lawful jeopardy and entitled to seek an order of prohibition against any further hearing or determination.

15. McKechnie J. in reviewing the law held that a plea of *autrefois acquit* or *convict* is only available in a situation where *certiorari* is ordered when the impropriety complained of was within jurisdiction. It is only in those circumstances where discretion resides in the Court as to whether to remit or prohibit further trial.

16. It is my belief that in time, an appropriate case will come up for consideration where the blurring between the real differences between no jurisdiction and excess of jurisdiction and error within jurisdiction are further considered and refined and where the "line of authority running back over two hundred years" which has prevented an invalid sentence being severed from a preceding appropriate conviction will be again considered in the light of modern circumstances.

17. I consider that the correct approach for this Court to take in considering the particular facts of this case, where the error was not of no jurisdiction as in *Tynan* or an error occurring in the judgment as in *O'Mahony* but rather as a case where the conduct of the trial created unfairness, is to rely on the dicta of Walsh J in *Tynan* where he stated at p. 355;

> "It is also well established that a plea of *autrefois convict* or *autrefois acquit* cannot be established if it be based upon an adjudication which was in excess of jurisdiction or without jurisdiction, because such an adjudication is no adjudication at all. That, however, is something essentially different from the quashing by *certiorari* of an improper conviction by a tribunal of competent jurisdiction. Such a quashing would amount to an acquittal. Similarly, an improper acquittal by a court of competent jurisdiction would not be subject to being quashed on *certiorari*. In both these latter instances the accused person would have been in peril in that he was before a tribunal which might have subjected him to lawful imprisonment, or other lawful penalty. *The impropriety which would ground such an order of certiorari would be one referable to the conduct of the hearing of the tribunal, and not one referable to a matter vitiating the jurisdiction of the tribunal*." (My emphasis)

18. When this same dictum was opened to Barron J. in Singh v. District Justice Ruane, the learned judge was of the view that it did not apply except in relation to the quashing of an improper conviction by a tribunal of competent jurisdiction. In such a case the quashing would amount to an acquittal. Where there was a finding of no jurisdiction the dictum did not apply. The facts of Singh were that the District judge refused to permit the accused to call a witness to prove the company's certificate of incorporation unless he himself first gave evidence. The applicant refused to do this and was convicted. Barron J. held that there was jurisdiction to enter into an adjudication of the case but such jurisdiction was lost due to impropriety and held that the hearing was void *ab initio*. He then went on to hold at p. 613;

> "If there has been no valid adjudication, then there can be no objection to the matter being remitted for determination. There may be cases, as contended for by the applicant, in which the order of *certiorari* quashing a conviction would dispose of the matter finally. *The State (Keeney) v. O'Malley* [1986] I.L.R.M. 31 is such a case. There the prosecutor was convicted of failing to provide a sample of blood or urine contrary to the provisions of s. 30, sub-s. 3 of the Road Traffic (Amendment) Act, 1978. He sought to quash the conviction upon the ground that the respondent had acted upon inadmissible evidence and that in the absence of such evidence the ingredients of the offence could not have been established. This conviction was quashed. He then sought to prohibit a rehearing of the matter and Lynch J. held that he was entitled to such an order."

19. The facts of this case differ from those of *Singh*, where there was no real hearing of the facts and this case where a full hearing occurred; where the accused went into evidence and was cross examined and where she called a rebuttal witness who was cross examined. In these circumstances I do not believe that it can be argued that the proceedings were void *ab initio*. It is difficult to remove from my consideration the possibility that had the proceedings been conducted fairly, the accused may have been acquitted. I adopt the reasoning of Lynch J. in *The State (Keeney) v. O'Malley* [1986] I.L.R.M. 31 where he held that an order of *certiorari* may issue in two types of case: where there has been a want of jurisdiction, and where lawful jurisdiction has been vitiated by a fundamental error; only in the second type of case has an accused person lawfully been in peril, and only here is a plea of *autrefois acquit* permissible.

20. While I am unhappy with the use of the word *autrefois acquit* as equating to previous acquittal, as the Court has not adjudicated on the merits or otherwise of the prosecution case, I nevertheless hold that it would be wrong to remit the case for a re-hearing. In arriving at this conclusion the question I ask is whether the impropriety which occurred at the trial can be mended by a fresh hearing or an appeal or whether the accused will be prejudiced at that re-hearing. Her opportunity to be acquitted in the first instance, had the hearing been fairly conducted, is lost and she is put in a less advantageous position than another accused appearing for the first time for a properly conducted trial. I therefore make an order quashing the order of 11th June, 2007, and direct that no further trial should take place.