

**THE HIGH COURT
JUDICIAL REVIEW**

2007 No. 1565 JR

BETWEEN**COLIN HARVEY****APPLICANT****AND****DISTRICT JUDGE CLAIRE LEONARD AND THE DIRECTOR OF PUBLIC PROSECUTIONS****RESPONDENTS****Judgment of Mr. Justice John Hedigan delivered on the 3rd day of July, 2008.**

1. In these proceedings the applicant seeks:-

(1) An order of *certiorari* quashing the order of the first named respondent of the 9th November, 2007, whereby she remanded the applicant pursuant to s. 99(9) of the Criminal Justice Act, 2006, as amended by s. 60 of the Criminal Justice Act, 2007, back before District Court 54 Dublin Metropolitan District, before which Court there had previously been imposed upon the applicant a suspended sentence.

(2) If necessary an order of *certiorari* quashing the purported order of the first respondent "convicting" the applicant of the said offence or in the alternative a declaration that that order is a nullity.

The applicant entered a plea of guilty at Dublin District Court 46 on the 9th November, 2007, before the first named respondent in respect of a charge under s. 21(4) of the Misuse of Drugs Act, 1977. The applicant pleaded guilty and the prosecuting Garda gave a brief outline of the background facts. He also gave details of previous convictions and informed the first named respondent that on the 29th May, 2007, at District Court 54, the applicant received a sentence of three months, suspended for twelve months. He also gave evidence of the applicant's forty two previous convictions.

(3) The first named respondent convicted the applicant but stated she would not impose sentence until after the matter was remanded back before Judge O'Donnell at Court 54 on the 11th January, 2008, to allow him deal with the question of the suspended sentence. The first named respondent ordered that once the matter of the suspended sentence was dealt with before Judge O'Donnell, the matter would then be remanded back to her for sentence on the conviction which she had recorded against the applicant.

Leave to proceed by way of judicial review was given on the 26th November, 2007.

2. The grounds upon which relief is sought may be summarised as follows:-

(a) The Judge had no jurisdiction to send the applicant back before a Court that had imposed the suspended sentence.

(b) The applicant was not at the time a convicted person.

(c) In matters of summary jurisdiction conviction is not severable from sentence.

(d) The Judge acted in excess of jurisdiction, erred in law and failed to comply with the principles of natural and constitutional justice.

3. The proceedings are opposed on the basis that the order was made within jurisdiction and in accordance with the requirements of s. 99(9) of the Criminal Justice Act, 2006, as amended by s. 60 of the Criminal Justice Act, 2007. It is contended by the respondents that the offence with which the applicant is charged is one that is triable summarily only and the applicant has been convicted in accordance with law. It is argued that there is nothing to prohibit the first named respondent from convicting and sentencing on two different occasions and making two different orders, i.e. one to convict before referring the matter to Court 54 and a further one sentencing him thereafter.

4. It is further expressly pleaded in opposing the application that the first named respondent has jurisdiction (pursuant to s. 24 of the Interpretation Act, 2005 or otherwise) to prescribe the procedure in relation to remanding the matter before another Court pursuant to s. 99(9) of the Act where no rules of Court and Court forms have been laid down specifically governing the procedure. The lack of specific rules and forms for this procedure does not limit in any way the duty on the first named respondent to comply with s. 99(9) but leaves the Judge with discretion as to how the duty is to be performed.

The Law

5. Section 99 of the Criminal Justice Act, 2006, as amended by s. 60 of the Criminal Justice Act, 2007 provides:-

"(1) Where a person is sentenced to a term of imprisonment (other than a mandatory term of imprisonment) by a court in respect of an offence, that court may make an order suspending the execution of the sentence in whole or in part, subject to the person entering into a recognisance to comply with the conditions of, or imposed in relation to, the order.

(9) Where a person to whom an order under subsection (1) applies is, during the period of suspension of the sentence concerned, convicted of an offence, the court before which proceedings for the offence were brought shall, before imposing sentence for that offence, remand the person in custody or on bail to the next sitting of the court that made the said order."

6. It is submitted by the applicant that a District Court exercising summary jurisdiction has no jurisdiction under s. 99(9) as amended by s. 60 to remand an accused for consideration of a suspended sentence. In summary procedure it is alleged, a conviction does not have a free standing efficacy divorced from penalty.

7. Section 21(4) of the Misuse of Drugs Act, 1997, as amended, is an offence which is purely summary in nature.

8. I have been referred to O'Connor (*Justice of the Peace*) 1915 edition, page 207:-

"The general requisites of a good conviction are:-

- 1) That it be full and correct;
- 2) That the directions of the particular statute relative to the offence should appear on the face of the conviction to have been substantially complied with, both as regards the subject matter of the offence being clearly brought within the statute, and the adjudication;
- 3) That it be certain;
- 4) That all the facts necessary to support a conviction must be expressly alleged and not left to be gathered by inference or intendment (Paley 8th Edition, pages 195 et seq.). Proceeding to deal with the particular contents of a conviction, every conviction must contain:-

- (1) A statement showing that the offence is within the jurisdiction,
- (2) Names of complainant and defendant,
- (3) Time of offence,
- (4) Place of offence,
- (5) Description of offence with certainty and accuracy,
- (6) An adjudication permitted by statute."

9. I have also been referred to *Paley* on summary convictions, seventh Edition, 1892, which establishes that a judgment in a Court of summary jurisdiction must contain both an adjudication of conviction as well as an adjudication of forfeiture. At page 203, Paley states:-

"So, in a conviction under statute of 12 George 1, C34, which prohibited unlawful combinations among workmen and inflicting imprisonment at the discretion of the justices, the conclusion was "thereupon the aforesaid J. V. etc., are convicted before us for unlawfully etc. (stating the offence), contrary to the Acts of Parliament in that case made and provided." The Court declared that the conviction was clearly bad, for want of any judgment of the forfeiture. They said, "a conviction is equal to a verdict and judgment; but that this was a verdict without a judgment."

10. I was further referred to the judgments of *The State (Sugg) v. District Justice James O'Sullivan* [1980] 113 SS (Unreported, High Court, 23rd June, 1980) and to *The State (O'Reilly) v. District Justice Delap* (High Court, 20th December, 1985) and to the Supreme Court judgment in *The State (at the prosecution of Mairin de Burca) v. Robert O'hUadhaigh and Michael O'Donovan* [1976] 1 I.R. 85, where the Supreme Court held that where a sentence was quashed on certiorari, the conviction fell too. In his judgment in that case, at p. 92, Henchy J. held as follows:-

"In support of the submission that both convictions and sentence stand quashed is that, since it is common case that the sentences have been quashed on certiorari, it follows as a matter of law that the convictions have fallen with them. For my part, I am satisfied that that is the correct interpretation of the law. We have been referred to a long line of judicial authorities, running back over two hundred years, which show that an invalid sentence cannot be severed from a conviction so as to validate the conviction on its own since a conviction and sentence must stand together, I conclude that the quashing of the sentences in these cases also struck down the convictions."

11. It is also submitted that the applicant's entitlement to the benefit of the Probation Act would be lost if a conviction were recorded and then a sentence was later imposed.

12. The Probation of Offenders Act, 1907, provides as follows:-

"(1) Where any person is charged before a court of summary jurisdiction with an offence punishable by such court, and the court think that the charged is proved, but is of opinion that, having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, without proceeding to a conviction, make an order either:-

- (i) Dismissing the information or charge, or
- (ii) Discharging the offender conditionally on his entering into a recognisance, with or without sureties, to be of good behaviour and to appear for conviction and sentence when called on at any time during such period, not exceeding three years, as may be specified in the order."

13. It is argued that in this case the trial Judge has not reached any determination in respect of the penalty which might be imposed and has not reached any view as to whether the applicant should be afforded the benefit of the Probation Act. In those circumstances it is argued, it is evident that, as a matter of law, the Judge of the District Court cannot have proceeded to a conviction. If, in contrast, the Judge of the District Court has in law proceeded to a conviction, then the Court has, in effect and without hearing submissions in mitigation, excluded from its consideration the statutory provision in question.

14. Senior Counsel for the applicant, Mr. McDonagh, has very properly drawn the Court's attention to the case of *Patrick Burke v. Director of Public Prosecutions and Judge McNulty* [2007] I.E.H.C. 127, which appears to be against him. In that case, involving an accused charged with s. 3 of the Non-Fatal Offences Against the Person Act, 1997, Charleton J. recited that at the end of the evidence heard in the District Court "the applicant was convicted". Further at para. 14 of the judgment, Charleton J. went on to observe:-

"An accused may appeal once he is convicted and his entitlement to appeal does not depend on the imposition of a

sentence”.

15. Clearly in the view of Mr. Justice Charleton, the sentence and the conviction were separate actions.

16. It seems to me that the ratio of the above case shows that conviction and sentence whilst not severable are separate actions. It is not necessary to hold that conviction and sentence need to be severed as was meant in those cases cited in support of the applicant's submissions in order to uphold the actions of the District Judge in this case. The cases and materials cited deal with the integral nature of these two parts of the adjudication. If the one falls so must the other. Herein neither has fallen. The challenge is based on what I consider the mistaken view that conviction and sentence are so inextricably linked that nothing of substance can occur between them. That proposition cannot be correct. Experience over many years shows practitioners that District Judges regularly convict and put back for sentence. There may be sought probation or other reports or all manner of further evidence before sentence is imposed. The procedure contemplated by s. 99 is obviously different but nonetheless clearly occurring within the same hiatus between conviction and sentence. The reality in all such cases is that the accused has been convicted and awaits sentence. The wording of the Act could not be clearer and its meaning is also clear. The requirement on the District Judge is mandatory and the District Judge's actions were exactly in accordance therewith. In regard to the Probation Act any loss the applicant might suffer is provided by law.

17. It also seems to me that the first named respondent has jurisdiction to prescribe the procedure in relation to remanding the matter before the other Court pursuant to s. 99(9) of the Act as amended, notwithstanding the absence of rules of Court and Court forms specifically governing the procedure. The lack of such forms and rules, it seems to me, cannot interfere with the duty of the first named respondent to comply with s. 99(9) but rather leaves the Judge with the discretion as to how the duty is to be performed. For all the above reasons I refuse the reliefs sought in these proceedings.