Neutral Citation Number: [2011] IEHC 359

THE HIGH COURT

2010 1290 JR

BETWEEN/

B. G.

APPLICANT

AND

DISTRICT JUDGE CATHERINE MURPHY, DIRECTOR OF

PUBLIC PROSECUTIONS AND THE JUDGES OF THE

DUBLIN CIRCUIT COURT

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on the 20th day of September, 2011

1. The Criminal Law (Insanity) Act 2006 ("the 2006 Act") may be said to represent a modern, enlightened and humane response on the part of the Oireachtas to the plight of those afflicted by mental illness so far as their criminal responsibility is concerned. These judicial review proceedings present, however, a difficult point of statutory interpretation so far as one aspect of the construction of the 2006 Act is concerned.

2. The problem arises in the following fashion. The applicant is a 49 year old man with significant mental disabilities and intellectual deficits who has been charged with the sexual assault of a female, contrary to s. 2 of the Criminal Law (Rape)(Amendment) Act 1990 (as amended)("the 1990 Act"). It is clear from the medical evidence which is exhibited to the applicant's solicitor's affidavit that his treating consultant psychiatrist does not consider that he is fit to stand trial within the meaning of s. 4(2)(c) of the 2006 Act. I express no view on that question, but merely draw attention to this evidence in order to highlight the concerns which his legal advisers must properly have had in relation to this matter.

3. When the applicant originally came before the District Court in January 2010 it was indicated to the court that the Director of Public Prosecutions would consent to summary disposal of this indictable offence only if the applicant pleaded guilty. There then followed a series of adjournments which were variously designed to facilitate the making of appropriate disclosure by the prosecution and to obtain appropriate professional legal and psychiatric evidence. Matters came to a head in July 2010 when the Director outlined his position in writing:-

> "The DPP directed that the charge before the court proceed on indictment pursuant to s. 13 of the Criminal Procedure Act 1967. There is consent to the matter being disposed of if all the conditions of that section are met.
>
> Since a fitness to plead issue has arisen, the accused is not in a position to enter a plea, therefore s. 13 of the Criminal Procedure Act cannot be utilised. The fitness to plead issue therefore has to be determined by the Circuit Court.
>
> We will be making the application for the accused to be returned for trial for the fitness to be tried issue to be determined."

4. Following a full hearing on 23rd July, 2010, on the issue, District Judge Murphy concluded that she had no jurisdiction in the matter, save in the event that the applicant pleaded guilty. The prosecution solicitor, Ms. Farrell, confirmed that the Director wanted the issue of the applicant's fitness to plead to be sent forward for hearing to the Circuit Court. District Judge Murphy acceded to this submission and then sent the applicant forward on bail to the next sittings of the Dublin Circuit Court so that his fitness to plead could be determined by a judge of that Court.

5. Here, then, is the nub of the main problem in this matter, namely, which court should determine the fitness to plead issue. Counsel for the Director, Mr. McDermott, submits that this decision has been assigned to the Circuit Court. Counsel for the applicant, Mr. O'Higgins SC, disputes this. He submits that this construction would be anomalous since it would mean that if it were ultimately held that the applicant was fit to plead, he would have been deprived of the right to plead guilty in the District Court following a summary disposal of the matter. In the event of a guilty plea, it would be before a judge of the Circuit Court who would be free - in theory, at least - to sentence the applicant as if he had pleaded guilty to an indictable offence following a conventional return for trial.

6. Yet, on this hypothesis, since the District Court cannot determine whether the applicant was indeed fit to plead, this would mean that the applicant's legal advisers would not be in a position to give him appropriate advice as to whether he should indeed plead guilty in the District Court, thereby accepting the Director's offer, since his mental capacity to take such a step was, as a matter of law, in serious doubt.

7. This, accordingly, is the issue of statutory construction which presents itself for resolution at this juncture. It may be convenient, however, if I here observe that in an earlier stage of these proceedings I permitted the applicant to amend his pleadings to enable him to raise both constitutional and ECHR issues in the event that the Director's argument regarding the construction of the 2006 Act was correct. The parties are agreed, however, that I should first proceed to determine the issue of construction, with the constitutional issue (and, indeed, if ultimately necessary from the applicant's perspective, ECHR issues) arising only in the event that I ruled adversely to the applicant's submissions on this issue and in respect of another issue concerning the validity of the return for trial.

The offence of which the applicant stands charged

8. Section 2 of the 1990 Act (as amended) provides:-

> "The offence of indecent assault upon any male person and the offence of indecent assault upon any female person shall

be known as sexual assault.

> (2) A person guilty of sexual assault shall be liable on conviction on indictment to imprisonment for a term not exceeding 5 years."

9. It is plain that s.2 creates what might be described as a "pure" indictable offence, or to adopt the terminology used by McMahon J. in *Director of Public Prosecutions v. Hunt* [2011] IEHC 56, a non-hybrid indictable offence. In other words, such an offence always remains an indictable offence: see *Director of Public Prosecutions v. GG*. [2009] IESC 127. In this respect it is different from other types of offences which are triable either way.

10. Yet s. 13 of the Criminal Law Procedure Act 1967 allows a District Judge to accept a guilty plea in respect of a s. 2 offence provided that "the court is satisfied that [the accused] understands the nature of the offence and the facts alleged." Section 13(2)(a) requires the consent of the prosecutor (i.e., the Director) for such summary disposal. Nevertheless, where there is such summary disposal, the maximum range of penalties is confined by that sub-section to that appropriate to a minor offence. Since, however, the District Court cannot ascertain whether the applicant understands the nature of the offence, the sub-section cannot presently be invoked, quite independently of the fact that there has been no indication by the applicant that he might wish to plead guilty.

Has the District Court jurisdiction to try this offence in a summary fashion?
11. Section 4(3)(a) of the 2006 Act deals with the circumstances in which the District Court can deal with a fitness to plead issue. It provides thus:-

> "Where an accused person is before the District Court (in this section referred to as "the Court") charged with a summary offence, or with an indictable offence which is being or is to be tried summarily, any question as to whether or not the accused is fit to be tried shall be determined by the Court."

12. The applicant has not, of course, been charged with a summary offence. He was rather charged with an indictable offence which could only be tried summarily provided he pleaded guilty and provided also that the District Judge was satisfied that he understood the nature of the offence and the facts alleged. But these essential statutory pre-conditions to the exercise of that jurisdiction are not - as yet, at least - in place in the present case. It cannot therefore be said that the offence in question "is being or is to be tried summarily", since without these pre-conditions being satisfied, the offence will never be tried summarily.

13. In the present case, the effect of the Director's direction was that the applicant was to be tried on indictment if, for whatever reason, he did not plead guilty. Here the applicant did not plead guilty and the District Judge could not have been satisfied that he understood the nature of the offence. It follows, therefore, that in these circumstances s. 4(3)(a) cannot apply to the present case and the District Court had no jurisdiction to try the offence summarily having regard to the facts of the case as presented.

Does the Circuit Court have jurisdiction in this case?
14. If, then, s. 4(3)(a) does not apply , then, as we shall now see, s. 4(4)(a) must apply. It provides as follows:-

> "(a) Where an accused person is before the Court charged with an offence other than an offence to which paragraph (a) of subsection (3) applies, any question as to whether that person is fit to be tried shall be determined by the court of trial to which the person would have been sent forward if he or she were fit to be tried and the Court shall send the person forward to that court for the purpose of determining that issue."

15. As the applicant is a person charged with an offence "other than an offence to which [s.4(3)(a)] applies", it follows that the mandatory provisions of s.4(4)(a) govern the case. This in turn means that that the District Court was obliged to return this applicant to the Circuit Court and it is that latter Court alone which has jurisdiction to hear and determine the fitness to plead issue.

16. It follows, therefore, that the District Judge was entirely correct in her decision to return the applicant for trial in the Circuit Court. Of course, in arriving at this view, I am conscious of the further argument which the applicant's legal team proposes to advance at the next phase of this hearing, namely, that this construction of the 2006 Act gives rise to an unconstitutional lacuna in that the applicant has no real means of availing of the opportunity - should this prove advantageous to do so after the determination of the fitness to plead issue - of pleading guilty before the District Court and thereby securing the benefit of a lower range of maximum sentences which might by statute be imposed on him. The applicant thus contends that this lacuna amounts to a form of unconstitutional discrimination contrary to Article 40.1 as between those persons whose mental capacity is not in doubt on the one hand and those other persons (such as himself) whose respective fitness to plead requires to be judicially determined on the other.

17. I express no view at this juncture in relation to this question, save to observe that it will now arise for argument and adjudication in the light of this judgment.

Error on the face of the record
18. The applicant further contends that the two orders providing for a return for trial are defective and should be quashed. (I am using the term "return for trial" somewhat loosely here as a convenient shorthand. In strictness, the order is one which directs the sending forward of the applicant to the Circuit Court to enable the question of fitness to plead to be determined.) There are indeed two such orders, both of which contain errors. Thus, for example, the first such order does not specify the offence with which the applicant was charged and nor does it actually specify the precise venue where the issue of the applicant's fitness to be tried is to be determined by the Circuit Court. The second order might be said unnecessarily to have duplicated the first. The order is moreover expressed to be signed by a "Judge of the District Court Service", as distinct from the proper express expression, i.e., signed by "a judge of the District Court."

19. It is hard to avoid the conclusion that neither order as so drafted is quite satisfactory. But does this mean that the order should be quashed on the basis that it contains an error on the face of the record? For the reasons I will now endeavour to set out, I cannot agree that it would be appropriate to take that step so far as the present case is concerned.

20. First, it must be recalled that the order in question is purely procedural in character in that it simply sends the applicant forward to the Circuit Court to enable the question of capacity to plead to be determined. In that respect, it is pertinent to note that the order does not, for example, finally adjudicate on legal rights, still less does it amount to a conviction or sentence. While this is not to suggest that the common law rules in relation to error on the face of the record do not apply to such orders, it is rather to say that the fact that the order does not record a conviction or impose a sentence is a factor to be taken into account in determining whether a court should quash a return for trial, or (as here) something akin to a return for trial: see, e.g., *The State (Walsh) v. Maguire* [1979] I.R. 372 at 385-386, per Henchy J. This is especially so when, as with the decision in *Walsh*, it is perfectly plain that the

prosecution could (and, indeed, in all probability, would) seek to have the applicant again sent forward to the Circuit Court to enable the issue of fitness to plead to be determined were I now to quash these orders on the grounds of error on the face of the record.

21. Second, there can be no doubt as to what the District Judge both did and what she intended to do. All parties perfectly understood what had been proposed when she gave an ex tempore ruling sending the applicant forward to the Circuit Court for the fitness to plead issue to be determined. Thus, for example, in her grounding affidavit, Ms. Binchy, solicitor for the applicant, states that it was "confirmed by Ms. Farrell [the prosecuting solicitor] that the DPP wanted the case to be sent forward for the fitness to be tried issue to be determined." No real disadvantage accrued to the applicant or his legal advisers by reasons of these errors. Even if, therefore, these errors can be justly characterised as being errors on the face of the record (as distinct from some form of harmless or insubstantial error), I do not think that any useful purpose would be served by quashing the orders in question given the absence of any real prejudice to the applicant: see, e.g., by analogy the comments of Finlay P. in *The State (Coveney) v. Special Criminal Court* [1982] I.L.R.M. 284, 289.

22. Third, and in any event, the applicant could properly have sought to have the orders rectified by the District Judge, whether by virtue of the slip rule (O. 12, r. 17 of the District Court Rules, 1997) or the inherent jurisdiction of the Court, once the nature of these errors became clear. Like all courts of record, the District Court has a jurisdiction to correct its own orders once it is clear that the order as drawn up does not correctly or accurately reflect the order which the court "actually intended and decided": see *Director of Public Prosecutions v. Judge Reilly* [2008] IEHC 419, per Cooke J. Had such an application been made to District Judge Murphy and the defects in the orders drawn to her attention, there is little reason to suppose that she would not have exercised her jurisdiction to rectify and remedy them.

Conclusions

23. It follows, therefore, that, for the reasons stated, I would uphold the validity of the order made by District Judge Murphy. In the light of this construction of the 2006 Act, the constitutional issue also relied on by the applicant next falls to be determined. I will discuss with counsel how best to proceed with the next phase of the hearing.