Neutral Citation Number: [2012] IEHC 67

THE HIGH COURT

JUDICIAL REVIEW

2011 296 JR

BETWEEN

SALOMON YEAGAR

APPLICANT

AND

HIS HONOUR JUDGE O'SULLIVAN, DISTRICT JUDGE WATKIN AND THE DIRECTOR OF PUBLIC PROSECUTIONS

DEFENDANTS

Judgment of Mr Justice Charleton delivered on the 20th of March 2012

1. This is an application to quash an order of the Circuit Court, dated 30 March 2011, on appeal from the District Court, convicting the applicant of assault and sentencing him to imprisonment for four months with credit allowed for the time he had served awaiting his appeal. The applicant argues that because he had spent some 21 weeks on remand prior to conviction in the District Court that he has been required to serve a sentence in excess of the six month statutory maximum for the charge of which he was convicted.

2. The order of the Circuit Court is dated 29 April 2011 and reads that on 6 September 2010 the applicant was tried before the Dublin District Court on a charge of assault, the particulars being "On 28 April 2010 at PIER B DUBLIN AIRPORT in the Dublin Metropolitan District, assaulted SGT MICHAEL GRIFFIN contrary to section 2 of the Non-Fatal Offences against the Person Act 1997" and had received a sentence or four months imprisonment starting on that date, the Circuit Court on appeal affirmed the conviction, ordering "said defendant being convicted of the said offence and be imprisoned in Wheatfield Prison for the period of four months, commencing 30 March 2011, allow for time served".

3. The facts giving rise to this application commenced when the applicant first entered the State on 28 April 2010. Sgt Michael Griffin was in Dublin Airport, Collinstown, supervising passengers who had just disembarked on a flight from Abu Dhabi. He observed that the applicant was not joining any of the immigration queues. He approached the applicant and identified himself. The applicant gave his name as Salomon Mario Garcia and claimed to be a national of Liberia and also claimed not to have a passport. He was escorted back to the arrivals gate and on the way dropped a passport-like document onto the ground from under his clothing. When Sgt Griffin bent to pick it up he was attacked from behind by the applicant who struck him a number of times so that he fell on the stairs. That which was dropped was a forged Guatemalan document. The applicant was taken into custody and was charged.

4. Because of the issues surrounding his identity, the applicant could not obtain bail. He was therefore remanded in custody for a considerable time awaiting trial in the District Court. There is no question but that the learned judge of the District Court conducted a fair trial and made a valid order. Upon conviction, the applicant appealed but spent time in custody before he could enter into reconnaissance and be released. That time in custody serving a sentence imposed by the District Court pending an appeal to the Circuit Court amounted to one month.

5. A person found guilty of an offence contrary to section 2 of the Non-Fatal Offences against the Person Act 1997 of assault is liable to a fine or to imprisonment for a term not exceeding six months or both. It is clear from the papers that both the judge in the District Court and the judge in the Circuit Court were aware of the sentencing jurisdiction as it applied to the applicant when sentencing him.

6. When the applicant was imprisoned by the Circuit Court on conviction for this offence, he sent to Mountjoy prison accompanied by a temporary warrant. This warrant simply stated that he had been imprisoned for a "period of four months with credit for any time served". The reference to "time served" is to be noted in contrast to the absence of any reference to a discount based on time on remand awaiting trial. The applicant's solicitor took the view that, as he had been on remand awaiting trial in the District Court and had also served a month of a sentence upon appealing his conviction to the Circuit Court, with remission, he had already been in jail for the equivalent of that sentence. The solicitor therefore considered that a habeas corpus application should be brought. This failed because the governor of the prison, taking account of what had been written on the temporary warrant, had felt that it was unsafe to imprison the applicant and had released him upon the first representation of his solicitor. The governor now has second thoughts about this decision because, after release, the final committal warrant was furnished to him. This specified that the applicant was to be imprisoned for four months "making allowance for any part of the original sentence already served". This is a clear reference to the order of the District Court imprisoning the applicant for four months and in respect of which he had served one month because of not being able to enter into reconnaissance pending an appeal to the Circuit Court. The release of the applicant was therefore early and was in error. The order of the Circuit Court makes it clear that the sentence began on 30 March 2011. As the applicant has now been released early he cannot be imprisoned again on this warrant.

7. Circumstances may arise where the interests of justice may require a sentencing court to take into account the time which a prisoner has spent in custody on remand. The backdating of any sentence or the reduction in a sentence to take into account time served is part of the overall responsibility as to sentence which is vested in the trial judge. While remand in custody is unpleasant and is a deprivation of liberty, it occurs due to unavailability of bail and this, in turn, is a right of which an accused is deprived only on being proved as a probability that he or she will interfere with witnesses, will abscond, or has a history of serious offending making it likely that further offences will be committed while on bail. The remand of the applicant would probably not have taken place were it possible for him to prove his identity in the context of the circumstances as they unfolded in Dublin Airport. The conditions of remand are different under the Prison Rules for those who are convicted prisoners to those which apply to remand prisoners. In *The People (DPP) v FitzPatrick* [2010] IEHC 2, Finnegan J, giving the judgment of the Court of Criminal Appeal stated:

> "The learned trial judge on the basis of the information available to him made a decision to sentence the applicant to 5 years imprisonment and to suspend two years of that but not to make any allowance on the basis that he had spent time

> in custody awaiting trial. Nonetheless it must have been clear to the learned trial judge had some time had been spent in custody. In these circumstances it is worth recording that time spent in custody is not of necessity taken into account in arriving at a sentence. Sentencing is not necessarily based on a detailed and precise mathematical formulaic manner of proceeding".

8. This court is bound by that precedent. It may be that in the future an argument can be made that having regard to the amount of time spent on remand in custody awaiting trial, a failure to take such time in custody properly into account can amount to a fundamental error of jurisdiction by the District Court or, on appeal, by the Circuit Court. In the context of this case it is neither necessary nor appropriate to rule whether the same could ever amount to grounds for judicial review.

9. The applicant has had the benefit of early release from custody. In addition, this judicial review application is being brought within a context where it would also be appropriate to refuse it on discretionary grounds. The order made by the Circuit Court is now spent and cannot be revived. The applicant seeks to quash a conviction by reference to an argument on sentence where the correctness of the conviction giving rise to the disputed sentence cannot be doubted and where he has had every benefit arising out of an understandably hasty, but correct, draft of a committal warrant. In *Barry v District Judge FitzPatrick* (Supreme Court, unreported, 20 December 1995) Hamilton CJ considered the effect of spent orders within the context of judicial review as a discretionary remedy, stating at page 6-7 of the unreported judgement:

> "Though the remand in each of these cases was granted by the learned district judges in excess of their jurisdiction, the fact remains that the order as made in each case are spent and that of the learned trial judge was correct in the exercise of his discretion to refuse the relief sought in respect of by the applicant. As stated by him, "the relief of judicial review is a discretionary remedy" and I am satisfied that the learned trial judge properly exercised his discretion in this matter. He was quite correct in holding that an order of certiorari, if granted, would have no effect in quashing an order which was already spent and which would be a pointless exercise".

10. Added to the situation described by the Chief Justice is the injustice which would result from quashing by reference to an allegedly minor error in sentence, a valid conviction in respect of a disturbing attack on a Garda officer.