(1984) ILRM 332

STATE (O'R)

003380

THE HIGH COURT

1980 No. 23 S. S.

THE STATE (PATRICK O'ROURKE AND JOHN WHITE)

.v.

HIS HONOUR JUDGE FRANK MARTIN

1980 No. 469 S. S.

THE STATE (PAUL O'FLAHERTY)

.v.

HIS HONOUR JUDGE FRANK MARTIN

Judgment of Gannon J. delivered 29th July 1983.

On the 31st of October 1980, Mr. Justice Barrington granted a Conditional Order of Certiorari on the application of the prosecutor Paul O'Flaherty, directed to His Honour Judge Frank Martin of the Dublin Circuit Court to send forward to the High Court to be quashed unless cause shown to the contrary, his Order of the 21st of October 1980. By that Order the learned Circuit Court Judge had dismissed an appeal brought by the prosecutor against his conviction in the Dublin District Court of receiving stolen goods

knowing them to be stolen and had affirmed that conviction and varied the punishment therefor by imposing a sentence of twelve months imprisonment in lieu of a fine of £10.00 imposed in the District Court. The grounds upon which the Conditional Order of Certiorari was granted are stated to be as set out in paragraphs (a) and (b) and (c) of paragraph 9 of the affidavit of the prosecutor sworn on the 30th of October 1980. These are as follows:-

"(a) that the learned Respondent declined to judicially or at all to consider a compelling view of the evidence, viz. that it went to larceny not receiving, on the grounds that it would have the effect of constraining him to aquit me of the receiving charge.

(b) further, or in the alternative, that the learned Respondent appeared to consider the above view of the evidence for the reasons stated.

(c) that the increase in sentence from the £10.00 imposed by the learned District Justice to the sentence of twelve months imprisonment imposed by the learned Respondent was imposed unfairly and other than in accordance with natural

or constitutional justice."

Cause was shown by the Respondent the learned Circuit Court Judge by affidavit on his behalf of an assistant solicitor of the Chief State Solicitor sworn on the 15th of January 1981. The application by the Prosecutor to make absolute the Conditional Order notwithstanding cause shown came before this Court on the 9th of March 1981.

On the 18th day of January 1981 Mr. Justice Barrington granted a Conditional Order of Certiorari on the application of the Prosecutors Patrick O'Rourke and John White directed to His Honour Judge Martin of the Dublin Circuit Court to send forward to the High Court to be quashed unless cause shown to the contrary his Orders of the 14th of January 1981. By these Orders the learned Circuit Court Judge had dismissed appeals brought by the Prosecutors against their convictions in the District Court of assaults on one Gerard Hughes and had affirmed the convictions and varied the punishment in each case by imposing a sentence of three months imprisonment on each Prosecutor in lieu of the fine of £50.00 imposed in the District Court. The grounds upon which the Conditional Order of Certiorari was granted are stated to be set

out in paragraph 9 of the affidavit of the Prosecutor, John White sworn on the 18th of January 1981. These are as follows:-

"9. I say and believe that the hearing of my said trial was not conducted in due course of law or in accordance with natural or constitutional justice in that:-

(a) evidence of a criminal offence, other than the offence with which we were charged, was permitted to be given against us on the hearing of the said appeal.

(b) the said evidence was grossly prejudicial and was unwarranted in that it had no probative effect in relation to the charge before the Court.

(c) that the increase in sentence from the £50.00 imposed by the learned District Justice to the sentence of three months imprisonment imposed by the learned Respondent was imposed unfairly and other than in accordance with natural or constitutional justice.

(d) that the sentence imposed by the learned Respondent was not one justified or necessitated by any legal or social consideration and was a negation of, or a

failure to vindicate, our constitutional right to liberty.

(e) the omission on the part of the learned Respondent to convey a view of the appropriate sentence on conviction was, in the circumstances, of an appeal and in the context of there being no further appeal on sentence, a failure to vindicate our said constitutional right."

Cause was shown by the Respondent the learned Circuit Court Judge by affidavit on his behalf of an assistant solicitor of the Chief State Solicitor sworn on the 2nd of February 1981. The application by the Prosecutors to make absolute the Conditional Order notwithstanding cause shown came before this Court on the 9th of March 1981.

As the substantial matter of complaint in each case relates to the variation and increase in severity of punishment in the Circuit Court over that imposed in the District Court both applications have been heard together. In both cases it was claimed that the reason the appeals were taken was to protect and vindicate the good name of the Appellant who did not intend that the punishment imposed by the

District Court should be reviewed, but was obliged by the Court forms and rules to seek to appeal without making distinction between conviction and sentence. It was also argued in both cases that the Circuit Court has no jurisdiction on the hearing of an appeal from the District Court to impose a penalty greater than that imposed by the District Court. For the Prosecutors in both applications it was argued that the imposition on appeal of an increased penalty is contrary to the concepts of justice and should not be done without previously warning the Appellant of the Court's intention to consider so doing. In support of the submission that the Appellant to the Circuit Court could limit his appeal to the issue of conviction and preclude the Circuit Court from considering the matter of penalty reference was made to an unreported judgment delivered by Mr. Justice McMahon on the 25th of November 1980 in The State (Aherne) .v. Governor of Limerick Prison. As this decision was the subject of an appeal to the Supreme Court the further hearings of these applications were adjourned to be resumed when the decision of the Supreme Court on that appeal would be known.

Upon the resumed hearing on the 1st of June 1983 the judgments delivered by the Supreme Court on the 20th of April 1982 in The State

(Aherne) .v. Governor of Limerick Prison 1983 I.L.R.M. 17 were considered and accepted as binding in this Court on the issue of the jurisdiction and authority of the Circuit Court upon hearing an appeal from the District Court to consider vary or increase the penalty imposed upon conviction in the District Court notwithstanding that the Appellant did not appeal against sentence. The ruling of the Supreme Court is that upon such appeal the Circuit Court has jurisdiction and authority to vary by increasing the punishment imposed in the District Court. In his judgment, Walsh J., with whose opinion all the other members of the Court agreed pointed out that the right of appeal from the District Court to the Circuit Court is prescribed by statute and limited by the terms of the statute and cannot be varied by rules or practices at variance with the statute but could be changed only by enactment of the legislature. He cites from a judgment of Pallas C. B. in EX p. M'Fadden, Judgments of the Superior Courts in Ireland, 168 to explain that the appeal as created by statute is "a new trial in every sense of the word, that is to say in the result both conviction and sentence were open to review depending on the outcome of the re-trial." At page 22 of the Report in 1983 I.L.R.M. Walsh J. says:-

"Looking at the matter from first principle and without authority,

one can see that unless there was a statutory provision to the contrary why such a construction should be accepted. An appeal by way of re-trial enables the possibility of a totally different case being made by either or both sides. The case may on the re-hearing appear to be a much more aggravated one than at first appeared, or vice versa. All these matters go to the sentence. The re-trial commences on an assumption that the accused is innocent until he is proved guilty on the re-trial and it would appear somewhat unusual if he starts off the new trial with a sentence already determined and that the only question remaining is whether it shall be enforced or not depending upon conviction. It is undoubtedly true that the 1961 Act permits the appeal judge, when the appeal is against sentence only, to consider so much of the facts as may be necessary for the purpose of sentence but that is very far short of a complete re-hearing of the merits of the case and the merits of the case may have a very strong influence on the sentence which is ultimately imposed."

He went on to discuss and dismiss arguments based on apparent

unfairness and false comparison with appeals to the Court of Criminal Appeal. In his judgment Griffin J., also cites from the judgment of the Chief Baron in M'Fadden's case and sets out a careful analysis and construction of the statutory provisions in arriving also at the conclusion that upon an appeal from a District Court conviction to the Circuit Court the latter Court has jurisdiction, authority, and inferentially the obligation, to impose the punishment which the judge hearing the appeal considers appropriate on the evidence before him.

Consequent upon the decision of the Supreme Court in Aherne's case the two applications in this Court became confined to a consideration by way of judicial review of the way in which the Circuit Court performed its function as an appellate court hearing these two District Court Appeals, but not a review of whether the sentences imposed after hearing the appeals were appropriate or not. Within these limitations and without an issue of the constitutionality of the statutory provisions upon which the jurisdiction of the Circuit Court is founded Mr. Carney for the Prosecutors on both applications made valiant efforts by argument to persuade this Court to quash the Orders of His Honour Judge Martin

on the basis that the appeals were conducted in his Court and his Orders made without due regard to principles of justice and the constitutional rights of the Appellants. It is his submission that in these cases the primary and bona fide intention of each Prosecutor was to vindicate his good name and livelihood. The hazard or apprehension of an increase of penalty is an inhibiting factor which would be a deterrent to the degree of preventing him from exercising his constitutional right of protecting his good name and character. He further submitted that it was contrary to the principles of justice for the learned Circuit Court Judge on hearing the appeal to proceed to increase the punishment without giving prior notice or warning to the Prosecutor so as to enable him withdraw his appeal.

Having regard to the evidence put before this Court in the affidavits these arguments seem to me to be rather fallacious and contrived. There is no evidence that the learned Circuit Court Judge acted otherwise than in accordance with the Constitution and the laws of the Oireachtas. Apart from the matters of increase of punishment the Prosecutors in their affidavits make no complaint of any irregularities of procedure or of lack of attention to or

appreciation of their submissions. The Prosecutors White and O'Rourke make complaint in the grounding affidavit of the admission of evidence at the hearing of their appeal which they wished to have excluded. No point was taken on this aspect upon the application in this Court. They make no reference to their occupations or livelihood or intention to vindicate their good name. Nevertheless it appears from the affidavits showing cause that these matters were enquired into and considered by the learned Circuit Court Judge before declaring the punishment he imposed.

The Prosecutor O'Flaherty makes complaint primarily on what he considers an error in law in the view taken by the learned Circuit Court Judge on whether on the evidence his conviction should be for stealing or receiving. The nature and circumstances of his livelihood were given careful consideration before the sentence was imposed. It does appear from the affidavits and it is admitted that no submission was made to the learned Circuit Court Judge of any claim of a right of a constitutional nature or of any complaint of deprivation or inhibition of any constitutional right. It was not submitted to the learned Circuit Court Judge that he had no authority or jurisdiction to vary by increase the punishment imposed in the

District Court nor does it appear to have been submitted to him that to do so would affect in any way any constitutional right of the Appellant before him.

In support of his argument Mr. Carney has culled citations from the judgment of O'Dalaigh C. J., in re Haughey 1965 I.R. 217 at 263 and the judgment of O'Higgins C. J., in the State (Healy) .v. O'Donoghue (1976) I.R. 325 at 348. In these are stated and re-stated the principles that the constitutional guarantee that the State will by its laws safeguard and vindicate the citizen's good name includes a guarantee to the citizen of basic fairness of procedures as a matter of reality and not merely of form in the administration of justice. But in each of these cases there was evidence of facts on matter of substance indicating a failure of the protection of the constitutional right whereas in neither of the applications before this Court is there any such evidence. The case for the Prosecutors in each application is founded only upon argument of a mere hypothetical nature which, in my opinion, is of no substance. The Prosecutors make no complaint of the District Court procedure, trial, conviction or sentence. Before the hearing in that Court each Prosecutor had in the protection of his good name

and his livelihood the benefits of the presumption of innocence, of the onus of proof on the complainant to establish the charge laid beyond reasonable doubt, of competent experienced legal assistance, of the limitations inherent in the rules of evidence, of the protection of an independent judge whose determination of the issues, including the punishment, would be governed only by the course of the hearing in public before him and not affected by the opinions of others not present nor other external influences. Following conviction his good name remained tarnished unless and until the matter has been reviewed under the appeal procedure prescibed by law. Before his trial in the District Court he faced the hazard or risk of a punishment which might have seemed severe but was fortified with the presumption of innocence. Upon the appeal although a convicted person he is afforded a complete re-hearing before a different Court with all the benefits including the presumption of innocence which availed to him in the District Court. Upon the re-hearing by way of appeal the trial judge must and does proceed entirely independently without reference to the evidence given in the District Court and his judgment on punishment must be his own independent of the opinion of the District Justice.

To say of the Appellant that his right to a re-trial is fraught with a risk which would deter him from appealing because a sentence on appeal might be greater than that given on his trial is not, in my opinion, a basis for imputing any absence of basic fairness in the Court procedure. The nature and extent of the punishment which may be imposed by the Circuit Court on appeal cannot exceed that for which the Appellant was in fact on risk when facing his trial in the District Court. The purpose of the proceedings in both Courts is to do justice and the procedures, rules, and practices are the same in each Court. If the result of the hearing in the Circuit Court on appeal is different from that in the District Court the difference can only affect a person who, accepting a conviction, must also accept that his good name has been tarnished by his own wrongful act. A question of comparison of punishments as between the two Courts within the range of the same maximum permissible in both does not arise except for a person rightfully convicted. It seems to me that there can be no appearance of unfairness for an accused who wishes to appeal against conviction only by reason of putting himself in jeopardy in respect of the sentence unless it be supposed that he has been rightfully convicted.

He has the benefit of the presumption of innocence notwithstanding his conviction on the trial and if he has been rightfully convicted justice requires that the punishment be appropriate. It follows that the question of giving notice to the Appellant at or after the hearing of his appeal of an intention to vary the punishment imposed on the first conviction could not arise.

If pending his appeal the person convicted in the District Court had to endure the punishment, or part of it, imposed in that Court this factor could and would be taken into account on the appeal, but the provisions for bail and recognizances protect the Appellant from one of the hazards considered by the Federal Supreme Court of the United States in North Carolina .v. Pearce 395 U.S. 711 cited by Mr. Carney. In that case there was evidence of facts on matter of substance relating to the Court on the second trial which justified the imputation of a failure of the protection of the constitutional right of a nature not contemplated in the instant applications. The only other circumstance consistent with innocence and a wrong conviction which might give rise to apprehension for an Appellant putting his punishment in jeopardy might be a reasonable relief that the Court to which he may appeal would not give a fair hearing. Such circumstance whether it might

be similar to those in North Carolina .v. Pearce or otherwise is adequately provided for under the principles enunciated in The State (Healy) .v. O'Donoghue and the procedure for Certiorari.

The procedure for Orders of Certiorari as sought on these applications is most usually availed of to challenge Orders made as alleged without jurisdiction or in excess of jurisdiction by judges of the statutory Courts of limited jurisdiction. Because the judges of this Court as well as the judges of these statutory Courts are bound to uphold the Constitution and the laws there must be a presumption upon such applications for Certiorari that the judges of the statutory Courts have acted regularly and in accordance with the Constitution the laws and principles of justice. A party seeking an Order of Certiorari therefore must present prima facia evidence to rebut this presumption, and in the absence of such an Order of Certiorari should not issue. Nothing offered to this Court on these applications justifies imputing any lack of fairness or of justice or an excess of jurisdiction on the part of the learned Respondent the Circuit Court Judge. I am of opinion that on these applications the Prosecutors have not discharged the onus undertaken to obtain absolute Orders of Certiorari. The cause shown in my opinion should be allowed in each case and the Conditional Orders discharged.

S.G. 23/6/83