

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 406 J.R.]

BETWEEN

DANIEL HODNETT

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Meenan delivered on the 14th day of February, 2018.**Background:**

1. On 8th June, 2016 the applicant appeared before Dungarvan District Court charged with a number of offences including one count of unlawful possession of drugs, contrary to s. 3 of the Misuse of Drugs Act 1977, as amended, one count of driving without insurance, one count of driving without a licence and one count of obtaining services by deception, contrary to s. 6 of the Criminal Justice (Theft and Fraud Offences) Act 2001. In court, the applicant was represented by Ms. Amy Cahillane B.L., instructed by Mr. Aonghus McCarthy, solicitor, who had been fully briefed in respect of the applicant's case before the court.

2. A guilty plea had been marked in respect of the matters and the applicant was awaiting sentencing.

3. When the applicant's case came to be dealt with, despite being requested by counsel for the applicant to finalise the sentence, the District Judge refused to proceed on the basis that counsel was not attended by a solicitor in court and could not take instructions from the applicant. The District Judge stated that the sentence hearing could not be progressed until Mr. Aonghus McCarthy, solicitor, attended court on behalf of his client and refused to proceed with sentencing.

Application for judicial review:

4. Arising from the foregoing, the applicant seeks from this Court:-

(a) An order of *mandamus* by way of judicial review, compelling the District Judge to permit counsel to appear and to conduct the proceedings as defence counsel for the applicant before Dungarvan District Court and to appear and to act on behalf of the applicant and take instructions from the applicant without requiring the instructing solicitor to be in attendance.

(b) A declaration that counsel is permitted to take instructions and conduct the case before the District Court without the need of the instructing solicitor to be in attendance.

Affidavits filed:

5. In support of the application, there is an affidavit filed by Ms. Cahillane B.L. It should be said that this affidavit was filed in circumstances where, unfortunately, the DAR was not operating in the District Court at the relevant time period. In the course of her affidavit, Ms. Cahillane B.L., states:-

"5. I can confirm that District Judge Finn refused to proceed with the case because as per para. 10 of Mr. McCarthy's affidavit he stated that because I was not attended by a solicitor I could not take instructions from the applicant if I were not attended. District Judge Finn refused to hear from me because I was appearing as a barrister unattended by an instructing solicitor. I say that this was the sole reason why the case did not proceed on that date and why District Judge Finn directed the attendance of Mr. McCarthy in court.

6. I say that the suggestion that the matter was adjourned so that "full instructions" could be taken as to the applicant's fitness to plead, is not correct. I say that I had taken full instructions from the applicant and read the relevant reports. I say that I am a competent counsel and that the presence of a solicitor could not have furthered matters in this regard and that I was capable of taking these instructions myself."

6. There is an affidavit of David Nolan, Inspector of An Garda Síochána, who was in attendance in court as the prosecuting inspector. He states in his affidavit that counsel for the applicant indicated to the court that the applicant suffered from a psychiatric condition, that his mental condition had recently deteriorated and that he was heavily medicated. The District Judge enquired as to whether the applicant was fit to plead. Inspector Nolan states that:-

"counsel replied: "yes, he is. Just about" or words to that effect. The judge then adjourned the case to Dungarvan District Court on 22nd day of June, 2016. My recollection is that this was done to enable the applicant's solicitor to be present in order to deal with the question of whether the applicant was fit to be tried and in order to ensure that full instructions would be available to the court on that date..."

7. On the basis of the affidavits, the following can be stated:-

- (i) Counsel was instructed by a solicitor, was fully briefed and in a position to take instructions from the applicant;
- (ii) The District Judge did not direct that any further reports be obtained concerning the mental status of the applicant; and
- (iii) The hearing was adjourned by the District Judge so that the applicant's solicitor would be present in court on the adjourned date.

8. In the statement of opposition, the respondent states:-

"3. The learned judge was clearly anxious that proper instructions should be taken from the applicant in relation to his mental condition, a matter which was obviously relevant to the manner in which the case might be dealt with and to the nature of any sentence that might be imposed..."

9. No factual basis has been put forward to support the contention that "proper" instructions were required. As stated, counsel for the applicant was fully briefed and in a position to take instructions but nevertheless the District Judge adjourned the matter. The issue, therefore, which this Court has to decide is whether the District Judge was correct in law in adjourning the matter on the basis that counsel for the applicant was not attended by her instructing solicitor at the time when the case was being dealt with.

Consideration of Issue:

10. Order 6, rule 1 of the District Court Rules provides:-

"1. The following persons shall be entitled to appear and address the Court and conduct proceedings—

(a) any party to the proceedings; or

(b) a solicitor for such party; or

(c) a counsel instructed by the solicitor for such party."

11. This rule is clear and unambiguous. Refusing to deal with the applicant's case because counsel's instructing solicitor was not in court at the time is clearly in breach of the District Court Rules.

12. The court was referred to the High Court decision in *Andrea Heinnillan v. Governor of Cloverhill Prison* [2011] 1 I.L.R.M 1. This case was an inquiry pursuant to Article 40.4.2 of the Constitution. In that case, the District Judge refused to hear the applicant's counsel because he was not attended by his instructing solicitor. In giving judgment, Hedigan J. referred to O. 6, r. 1 of the District Court Rules and also to the contents of an affidavit sworn by the then chairman of the Bar Council. In the course of this affidavit, the various rules relating to the appearance of counsel in the court were set out. In giving judgment, Hedigan J. stated:-

"It is clear there has been some uncertainty concerning the right of counsel to appear in the District Court where instructed but not attended by a solicitor. I am glad to have the opportunity to clarify this matter for the benefit of District Court Judges and the legal profession. Provided that counsel is instructed by a firm of solicitors, he or she does not have to be attended in the District Court and has a right of audience in the District Court by virtue of their call to the Bar by the Chief Justice of Ireland. It was due to the failure to recognize this right of audience of counsel in this case that this court was obliged to hold that the order subsequently made was unlawful and that the applicant was therefore unlawfully detained. For this reason the Court ordered his immediate release."

13. This is a clear statement of the law.

14. In the course of submissions to this court, Mr. Feichín McDonagh, S.C., counsel for the applicant, informed the Court that it had been the practice of the respondent for many years to instruct counsel in the District Court, without a solicitor in attendance, to conduct prosecutions.

15. It was submitted by counsel for the respondent that it was not unreasonable that the District Judge might be unaware of the *Heinnillan* decision, referred to above. I agree with this but the same cannot be said as to an awareness of the District Court Rules. As I have said, the District Court Rule concerning the appearance of counsel in the District Court is clear and unambiguous.

16. By reason of the foregoing, the applicant is entitled to the reliefs sought. I will hear counsel on such further orders as may be required.