THE HIGH COURT
JUDICIAL REVIEW

2007 No. 1445 J.R.

BETWEEN

GERARD NEESON

APPLICANT

AND
JUDGE PATRICK BRADY AND THE DIRECTOR OF PUBLIC PROCECUTIONS

RESPONDENTS

Judgment of Mr. Justice John Hedigan delivered on the 11th day of June, 2008.

1. The application is for (a) an order of *certiorari* to quash the order refusing to grant a certificate of legal aid under the Criminal Justice (Legal Aid) Act, 1962, and for certain connected declarations and (b) an order of prohibition or one staying the continuance of the proceedings against the applicant. The application is grounded *inter alia* on an affidavit of the applicant and that of Garda Sergeant Paul Madden.

The grounds

2. On the 24th October, 2007, the applicant appeared before the first respondent in Swords District Court on foot of a charge of handling stolen goods, i.e. two mobile phones to the value of €152.00. He was represented by counsel, instructed by solicitors. The Court was informed that the applicant was opting for summary disposal of the charge. The proceedings were adjourned to allow the applicant to take legal advice and the Judge ordered a précis of evidence to be served on him for that purpose. Counsel for the applicant applied for legal aid and submitted a statement of means form. The applicant's income was agreed as being €180.00 per week. The Judge was informed that the allegedly stolen phones had been recovered. The presenting Garda advised the Judge that the applicant was "at risk". This is a well known euphemism to indicate that the presenting Garda was of the view that there was a risk of the applicant receiving a prison sentence if he pleaded guilty, or upon conviction. He also appraised the Judge of the facts which he gleaned from the précis. There was no suspicion that the applicant had stolen the phones. The Judge accepted the case was a minor matter and agreed to accept jurisdiction. The Judge indicated that he did not accept the applicant was "at risk". It may be taken from this that having heard all the details contained in the précis which had been imparted to him by the presenting Garda, knowing the value of the goods allegedly handled and that the goods had been recovered, the Judge did not think, in the event of a plea or a conviction following a trial, that the offence warranted a jail sentence. The Judge then further enquired of counsel if there were any exceptional circumstances. Counsel informed the Court that the applicant had very little financial means, was in receipt of disability benefit and could not defend himself. The Judge then refused a legal aid certificate. It appears that his reason for doing so was that in considering the gravity of the charge, he was of the view that the applicant was not at risk of imprisonment and therefore the charge was not so grave as to require him to grant legal aid. The applicant grounds his application upon the argument that the Judge did not conduct a proper enquiry, failed to consider all relevant matters attendant to the enquiry and/or acted in an unreasonable or irrational manner in making the decision that he did. The applicant's argument, it seems to me, boils down to the complaint that the presenting Garda said that he considered the applicant was "at risk" and the Judge, who had been appraised of the facts giving rise to the charge, the value of the goods handled and the fact they had been recovered, did not conduct an enquiry into why the Garda thought he was "at risk", if, as became clear, he did not agree.

The scope of judicial review in cases such as this

3. In *O'Neill v. Judge McCartan* [2007] I.E.H.C. 83, Mr. Justice Charleton observed that the function of the High Court in exercising its jurisdiction to ensure the proper application of constitutional and legal principles is strictly limited. I agree. Further in *The State (Daly) v. Ruane* [1988] I.L.R.M. 117 at p. 124, O'Hanlon J. considering the role of the High Court in *certiorari* proceedings observed:-

> "What must be stressed is that the certiorari procedure cannot be utilised to convert the High Court into a court of appeal from all decisions of the District Court, with the court being required to embark upon a re-examination of the evidence given before the lower court and a re-assessment of all submissions made during the course of the hearings in the lower court."

The relevant law

4. Section 2 of the Criminal Justice (Legal Aid) Act, 1962, as amended by section 5(6) of the Criminal Justice (Miscellaneous Provisions) Act, 1997, provides:-

> "(1) If it appears to the District Court before which a person is charged with an offence or an alternative court within the meaning of section 5 of the Criminal Justice (Miscellaneous Provisions) Act, 1977 before which a person is appearing –
>
> (a) that the means of the person before it are insufficient to enable him to obtain legal aid, and
>
> (b) that by reason of the gravity of the offence with which he is charged or of exceptional circumstances it is essential in the interests of justice that he should have legal aid in the preparation and conduct of his defence before it,
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> the said District Court or the alternative court, as may be appropriate shall, on application being made to it in that behalf, grant a certificate, in respect of him, for free legal aid (in this Act referred to as a legal aid (District Court) certificate) and thereupon he shall be entitled to such aid and to have a solicitor and (where he is charged with murder and the said District Court or the alternative court, as the case may be, thinks fit) counsel assigned to him for that purpose in such manner as may be prescribed by regulations under section 10 of this Act."

5. I have been referred to a number of cases by counsel on both sides. I have found most helpful the cases that follow. In *DPP (Kearns) v. Maher* [2004] I.E.H.C. 251 Smith J. upheld the decision of a District Court Judge to assign a solicitor on legal aid for sentencing alone. The trial had proceeded without representation, and when the District Court Judge convicted the accused and heard his list of previous convictions, he decided that a custodial sentence was a possibility and decided that the accused should have legal aid. Referring to s. 2, he stated:-

> "The section does not provide an entitlement to legal aid in all circumstances. Nor do the decided cases determine its application irrespective of the nature of the charge, even to indigent defendants, but only when the gravity of the

offence or exceptional circumstances appear to warrant such aid."

6. The same matter arose in *Cahill v. Reilly* [1994] 3 I.R. 547. In that case it originally seemed that the offence in question would most likely be dealt with by way of a fine or other non-custodial determination. After conviction, upon consideration of the previous convictions however, it seemed to be one that might attract a custodial sentence. Denham J. observed at pp. 551 – 552:-

> "It was open to the first respondent initially to consider the case to be one which may not or would probably not require a custodial sentence. Clearly this case became serious, from the point of view of a custodial sentence, when the court considered the previous convictions I am not deciding that in all cases where there is a statutory sentence of imprisonment possible that the accused has to be told of his right to be legally represented or to apply for legal aid. But I do hold that when a custodial sentence becomes probable, or likely, after conviction or on a plea of guilty in a situation where it may have not been likely before, then at that stage, at the sentencing, the District Court Judge should inform the accused, if he has not before, of his right to be legally represented or his right to apply for legal aid in relation to the sentence."

7. It is clear from these cases that the possible changing perception of the gravity of an offence from the earliest stage of criminal proceedings in the District Court to the post conviction stage can normally be adequately dealt with by the granting of legal aid after conviction. If some special circumstances arise where there has been a breach of the accused's right to be legally represented, where the interests of justice so require, then undoubtedly *habeas corpus* and/or some other remedy might be appropriate. In this case the applicant was represented by counsel and instructed by solicitors. The Judge was appraised by the presenting Garda of the facts surrounding the alleged offence. He was told that the Director of Public Prosecutions consented to summary disposal. He accepted jurisdiction. Counsel for the accused applied for a legal aid certificate. The Judge accepted that the applicant qualified under the heading of insufficient means. The presenting Garda was asked by the Judge whether the accused was at risk of a prison sentence. The presenting Garda said that he was. The Judge then enquired as to the value of the phones stolen. He was told that they were valued at €76.00 each and had been recovered. The Judge then decided that the applicant was not at risk of a prison sentence and asked if there were any exceptional circumstances as per s. 2(1)(b) of the Act of 1962, justifying legal aid. Counsel for the applicant addressed him on that point, raising matters, however, that seemed to address his insufficient means, a point already decided in his favour. The Judge then finding that there were no exceptional circumstances, refused a certificate for legal aid. It is argued that he should have enquired further when the presenting Garda expressed the view that he was "at risk"; he should not have decided on the basis of the value of the goods alone. It seems to me that the facts before the Judge when making the decision on gravity were quite sufficient to enable him to come to the decision he made. Moreover, as the cases above establish, were something to turn up after the decision, there would be nothing to prevent the application being renewed at a later date. In any event, I agree with the view expressed by Quirke. J. in *Costigan v. Judge Patrick Brady & the DPP* [2004] I.E.H.C. 16 in a similar application;

> "The question of the gravity of the charge was entirely a matter for Judge Brady."

8. Save for the instance outlined in the case of *Whelan v. Fitzpatrick*, Budd J. [2007] I.E.H.C. 213 where a Judge clearly fettered his power to ever grant legal aid in a particular category of cases, I find it hard to envisage a District Court Judge's decision on the gravity of an offence in such applications being quashed in the High Court. The District Court Judge can be assumed to be possessed of a wide ranging experience concerning the measure of gravity of offences within his or her jurisdiction. It is the function of the Judge to decide, not that of the presenting Garda. It is hard to imagine anyone in a better position than the District Court Judge to make such decisions and it is to the District Court Judge that the legislature has assigned the duty of so deciding. Even where facts emerge that show the offence was more grave than initially thought, an application can be renewed, and ultimately if real injustice emerges *habeas corpus* will lie. For these reasons I refuse the reliefs sought.