

**THE HIGH COURT**  
**JUDICIAL REVIEW**

[2017 No. 338 J.R.]

**BETWEEN**

**JAMIE MAHER**

**APPLICANT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**JUDGMENT of Mr. Justice Meenan delivered on the 1st day of May, 2018.**

**Background**

1. The applicant was charged with a number of offences before the District Court. Firstly, an offence contrary to s. 13 of the Criminal Justice (Public Order) Act 1994, as amended by s. 22 of the Intoxicating Liquor Act 2008, prosecuted by Garda Sharon Murray ("the Garda Sharon Murray Charge"), case no. 2016/26613. Secondly, an offence contrary to s. 21 of the Misuse of Drugs Act 1977, prosecuted by Garda Michael O'Donovan ("the Garda Michael O'Donovan Charge"). Thirdly, an offence contrary to s. 12(1)(b) of the Criminal Justice (Theft and Fraud Offences) Act 2001, prosecuted by Garda Ross Foy ("the Garda Ross Foy Charge"). The application before this Court concerns only the Garda Sharon Murray Charge.

2. On 8th December, 2016 the applicant appeared before Portlaoise District Court facing, *inter alia*, the Garda Sharon Murray Charge. At the hearing before the District Court, the applicant was represented by Mr. Aonghus McCarthy, solicitor, who had come on record and been granted a legal aid certificate in relation to the offence. On that date, the case was adjourned to 19th January, 2017. Both the Garda Ross Foy Charge and the Garda Michael O'Donovan Charge were adjourned to 27th January, 2017. Unfortunately, the applicant did not appear in court on 19th January, 2017. A warrant was subsequently issued for his arrest and he was brought before Portlaoise District Court on 26th January, 2017.

3. The transcript of the proceedings of the 26th January, 2017 records that the applicant pleaded guilty to the Garda Sharon Murray Charge:-

"District Judge: Now there's another charge. Garda Sharon Murray. Aonghus McCarthy deals with this. This is a charge of trespassing on the 24/11/2015 at 68 Hillview Drive, Nockmay. Are you pleading guilty or not guilty to that charge

Mr. Maher: Guilty

District Judge: Guilty. (*Addressing Mr. Fitzgerald*) Can you stand in for Mr. McCarthy

Mr. Fitzgerald: I can Judge but I'd have to take a brief instruction."

Later in the transcript:-

"Court clerk: Jamie Maher.

Mr. Fitzgerald: I contacted Mr. McCarthy in relation to that matter Judge.

District Judge: Yes.

Mr. Fitzgerald: and he asked could the matter go into tomorrow and he would be able to deal with it himself. I think it's the trespass charge.

District Judge: There's 2 bench warrants is that right?

Court clerk: Yes Judge.

District Judge: Now in relation to the warrant in Garda Sharon Murray's case, remain in custody to Portlaoise District Court at 10:30 27th of January for a plea or a date and Mr. McCarthy will be here is that right?

Mr. Fitzgerald: Yes Judge he'll be here."

4. The Garda Sharon Murray Charge, and the other charges, came before the District Court on 27th January, 2017. When the District Judge came to deal with the Garda Ross Foy Charge, it was decided to adjourn the case to allow for legal submissions, due to the complexity of the issues involved in the charge. The Garda Michael O'Donovan Charge was also adjourned. The District Judge imposed a six month sentence in respect of the Garda Sharon Murray Charge. I will now set out the relevant parts of the transcript. These are fairly lengthy extracts but it is important that they are set out in full, given the case being made by the applicant:-

"District Judge: Now there's a case here involving Mr. McCarthy that was put back for a probation report. Have you seen the report?

Mr. McCarthy: I haven't Judge.

District Judge: Yes. Is Ms. Hanlon here? She has your spare copy. I'll give you my copy of the report. I've underlined it but I've underlined everything so.

Mr. McCarthy: Thanks Judge. I appreciate that.

District Judge: He has failed to keep his appointments and... here she is now... have you got a report for Mr. McCarthy and Mr. Maher?

Have you had a chance to discuss that with him

Mr. McCarthy: No, would you mind letting it stand

District Judge: I'll just let it stand

Mr. McCarthy: Thank you very much

District Judge: I will just hear the facts from Garda O'Donovan on the other case, the obstruction case. Is the barrister here?"

Counsel, who had been instructed by Mr. Fitzgerald, solicitor, told the court that the applicant wished to be represented by Mr. McCarthy in respect of the Garda Michael O'Donovan Charge. Mr. Fitzgerald had practised with Mr. McCarthy but no longer continues to do so. It would appear that the applicant was not aware of the fact that they were no longer practicing together.

5. The transcript continues:-

"District Judge: ...Alright. Now did you tell your solicitor Mr. Fitzgerald yesterday you were pleading guilty to this charge?

Mr. Maher: I thought it was for a different arrest I didn't think it was for that time I didn't know what it was

District Judge: Alright well it's in for hearing today and you'd like Mr. McCarthy to be your solicitor is that right?

Mr. Maher: Yeah.

District Judge: Very good I'll transfer legal aid to Mr. McCarthy. I'll let it stand so that you can discuss the Probation Report and the hearing is going ahead. Thank you. Second calling.

Mr. McCarthy: I wonder Judge is disclosure current because I obviously will have to if the hearing is going to go on.

District Judge: Oh yes it was yes it was."

The District Judge proceeded to hear a civil case before returning to deal with the charges against the applicant. The transcript continues:-

"Mr. McCarthy: Yes Judge I've spoken to my friend in the state and the court has already directed that the prosecution re Ross Foy in relation to the burglary has gone back to the 2nd March for submissions. The Court indicated that Garda Murray's trespass charge and Garda O'Donovan obstruction charge are listed today for hearing.

District Judge: No there is a plea already on Garda Murray's charge and it was put back for a Probation Report. Isn't it. Maybe I've got it wrong. Just a second I have a Probation Report.

Mr. McCarthy: Apologies Judge. You are correct. Well you could be correct if I'm incorrect in that matter.

District Judge: I have the report here.

Mr. McCarthy: Very well Judge. Em what I've done is mentioned to Garda Murray and Garda O'Donovan that I wonder is the court is amenable to doing so is concluding all of Jamie's matters together Judge? I think it would be I suppose it would be in the interests of the state and in the interests of Jamie but more so in fairness in the interests of Jamie in light of the fact that his report is exceptionally poor to deal with all matters on 2nd March Judge.

District Judge: No, the reason I put that other matter back to 2nd of March was obviously because your submissions arrived late today and the state need a lot of time to review them

Mr. McCarthy: Yes Judge

District Judge: But I'm concluding the others matters today"

The Garda Michael O'Donovan Charge was adjourned, leaving only the Garda Sharon Murray Charge to be dealt with. The transcript continues:-

"District Judge: You seem to have worked it out between you. The 2nd of March for mention and I will reserve the 2nd of May for hearing. Now I am going to deal with sentencing in relation to the Garda Murray's case.

Mr. McCarthy: In respect of Garda Murray's Judge could I ask perhaps that you list that on the same day

District Judge: No I'm not listing that on the same date. It's put in for a Probation Report today and I want to deal with the sentencing. Can you address me in relation to the report.

Em, I think there was a plea of guilty and it was put back for a report. Now in relation to it he hasn't kept any appointments offered by the probation service. He was involved with Le Cheile previously but he has ceased due to his lack of commitment. He is currently on Community Service but he hasn't attended for his community service so I'd like for you to address me in relation to that. Yes Mr. McCarthy

Mr. McCarthy: Yes Judge. I suppose there are no genuine excuses to advance in respect of why he couldn't attend.

I'm asked to I suppose indicate an apology to the court for his lack of engagement to both Ms. Hanlon, I suppose who has put herself out to afford him the assistance that this young lad quite clearly needs.

He's also asked me to apologise to Garda Murray for his behaviour.

He's a young person of 20 years old Judge and I would classify him perhaps a tiny degree as someone who lived quite a naïve young individual.

I would not put him in the category of persons who I suppose engage in criminal activity to the extent that they would be part of any sort of sophisticated criminal enterprise.

I think he's a person who really took a wrong step when he started specifically to smoke cannabis and taking tablets at what he says is a light stage but I don't think he really appreciates the significance of what a light stage can lead into from my chats with him.

He spent the last night up in St. Pat's with to say the least a far more serious category in my respectful submission of criminal.

It looks to have hit him very hard Judge.

He hasn't ever done a jail sentence before and I know you are familiar with Mr. Maher.

He is a young person really at that stage of his life right now where he is right on the edge of the knife Judge.

*I am asking you I suppose in light of the fact where he did plead guilty in Garda Murray's matter* (emphasis added) there was nobody actually I think put in fear in respect of in terms of the actual subject matter of the offence itself.

It was just him being a nuisance and he is a person who does have a difficulty Judge with drugs.

I know you have given him the opportunity by ordering a Probation Report to assist him in engaging in that regard but what he said to me was that "I miss them", "I slept it out", he was up late basically smoking cannabis. It's completely not an excuse but it's quite tragically symptomatic of the difficulties he's facing.

I'm in your hands and he knows you can send him to prison with a prison sentence today.

If you do that it's the nuclear option he simply does into jail I suppose with other persons who I would hate to see him get to know I'll put it that way because I don't believe that Jamie is a person who himself has any predisposition to being a career criminal as it were.

He's a person who had made very silly choices towards the tail end of his teenage years and is now facing I suppose a stark reality.

Noteworthy I think that when I took his instructions I don't think he has any previous convictions from the children's court and he wasn't a person who got in great trouble as a teenage. I think they're all in the last couple of years if I'm not mistaken.

District Judge: I'll just hear the previous convictions again then"

Garda Sharon Murray then gave evidence concerning the applicant's previous convictions. The District Judge ultimately imposed a custodial sentence of six months detention in St. Patrick's Institution. The hearing concluded as follows:-

"District Judge: St. Patrick's Institution. I'll fix recognisances in the event of appeal.

Mr. McCarthy: Yes Judge.

District Judge: In his own bond €100 independent surety €100 or cash in lieu.

Mr. McCarthy: Thanks Judge

District Judge: Thank you

Mr. McCarthy: Could the court confirm just that I am assigned in respect of Garda Murray's charge

District Judge: Yes you are 2016/59021.

Mr. McCarthy: Thanks Judge. Both other matters for mention on the 2nd of March.

District Judge: The 2nd of March.

Mr. McCarthy: May it please the court. Thanks Judge."

### **Judicial Review Proceedings**

6. On 24th April, 2017 the applicant was granted leave to apply by way of an application for judicial review for:-

"A An Order of *certiorari* quashing the conviction and sentence of the applicant on the 27th of January 2017 when the applicant received a 6- month custodial sentence on foot of case number 2016/26613 at the suit of Garda Sharon Murray."

7. The grounds upon which this relief is sought are:-

- "(i) [The District Judge] erred in law and in excess of jurisdiction by sentencing the Applicant in relation [to] a charge to which he had not pleaded guilty;
- (ii) [The District Judge] acted unreasonably, irrationally and in breach of fair procedures and natural justice by sentencing the Applicant on foot of the said charge;
- (iii) The impugned decision is unreasonable, irrational and in excess of jurisdiction. It therefore lacks the essential characteristics of a lawful order..."

**8. The application was grounded upon the affidavit of Mr. Aonghus McCarthy, the solicitor acting for the applicant, and the applicant swore a verifying affidavit.**

Affidavit of Aonghus McCarthy

9. Having set out the relevant portions of the transcript of the hearings in the District Court, I will now refer to the affidavit of Mr. McCarthy.

10. At para. 7 of his affidavit Mr. McCarthy states:-

"7. The applicant instructed that he did not recall if he had entered a plea to any charge the previous day when a different solicitor had appeared on his behalf, but that in any event he did not wish to plead guilty to any of the matters before the court."

While at one stage of the proceedings the applicant did say that he thought the guilty plea "was for a different arrest", it is clear from the transcripts that when the District Judge was dealing specifically with the Garda Sharon Murray Charge, Mr. McCarthy did not question the guilty plea. In particular, when making a plea for mitigation on behalf of the applicant, Mr. McCarthy stated:-

"... I am asking you I suppose in light of the fact where he did plead guilty in Garda Murray's matter..."

11. In para. 8 of the affidavit Mr. McCarthy stated:-

"8. ... and Garda Murray understood that her charge was listed for mention only and indicated that if her matter was in for hearing, that an adjournment would be sought as a witness difficulty arose. I indicated that I had no difficulty with this application given that I had not been present the previous day and was unaware of any application made by the solicitor in attendance at that time..."

As is clear from the transcript, Garda Sharon Murray gave evidence when the District Judge was sentencing the applicant. At no point during cross-examination did Mr. McCarthy put any of the aforesaid to Garda Murray.

12. At para. 11 of his affidavit Mr. McCarthy stated:-

"11. I indicated to the court that I had no record of a guilty plea having been entered, however the judge stated that the applicant had previously entered a plea to this matter and that she was utilising the existing report before the court to proceed to a sentence..."

13. It is clear from the transcript that Mr. McCarthy did not question the guilty plea when the District Judge was dealing with sentencing.

14. At para. 12 of his affidavit Mr. McCarthy stated:-

"12. ... I proceeded to conduct further enquires with respect to this matter and I subsequently spoke to a representative from Portlaoise district court office who could not find a note of a plea of guilty in respect of this charge on any of the court records, and having reviewed my office file it became clear that no plea had ever been entered and in those circumstances the applicant should not have been convicted or sentenced."

The District Court record was exhibited in the affidavit of Mr. Hal McGuckin, on behalf of the respondent. This clearly records a guilty plea in respect of the Garda Sharon Murray Charge.

15. There are very serious discrepancies between what Mr. McCarthy deposed to in his affidavit and what appears on the transcript of the relevant proceedings.

**Legal Submissions**

16. The applicant made a number of detailed legal submissions to the Court about what constitutes a valid plea of guilty. On a factual analysis of the transcripts of the hearings of both 26th and 27th January, 2017, the applicant entered a plea of guilty in answer to the Garda Sharon Murray Charge. If there was any doubt about this, the submission made by Mr. McCarthy on 27th January, 2017, in the course of the hearing before the District Judge on sentencing where he stated "... I am asking you I suppose in light of the fact where he did plea guilty in Garda Murray's matter..." cannot be interpreted as anything other than the applicant, through his solicitor, confirming the guilty plea.

17. The Court was referred to the High Court decision of *Byrne v. Judge McDonnell* [1997] 1 I.R. 392. In this case, the applicant appeared in the District Court to answer a charge that he had failed to pay the correct bus fare, contrary to statute. In the course of the hearing, the applicant pleaded guilty. The applicant was convicted of the offence and was remanded in custody pending sentencing the following day. At that stage, a solicitor registered on the Free Legal Aid Solicitors' Panel was appointed to represent him. The solicitor took instructions from the applicant and the following day appeared in the District Court requesting that the applicant be allowed to change his plea. The District Judge refused this request and stated that he would only hear the applicant's solicitor on matters relevant to mitigation. The applicant obtained leave to seek *certiorari* on the grounds that the hearing before the respondent was conducted in breach of natural and constitutional justice and was not in accordance with due process of law. In giving judgment in the High Court, Keane J. (as he then was) granted the relief sought, holding that, in the circumstances, the

District Court Judge ought to have permitted the applicant, who had pleaded guilty, to change that plea to one of not guilty at any time before the case was finally disposed of. There are clear factual differences between Byrne and the instant case. Most obviously, as is clear from the transcript, there was no request by or on behalf of the applicant to change his plea of guilty to one of not guilty in respect of the Garda Sharon Murray Charge.

### **Conclusion**

18. The basis for these judicial review proceedings was that the District Judge sentenced the applicant in respect of an offence to which he had not pleaded guilty. This is a very serious case to make and this Court would expect that there would be evidence to support such a claim. The evidence is not there. It is entirely clear from the transcript that when the District Judge proceeded to consider the matter of sentence, the solicitor for the applicant made a plea in mitigation. At no stage did the solicitor question or express any doubt or reservation as to the applicant having pleaded guilty. No credible explanation has been advanced to explain the obvious discrepancy between the case that the applicant is making, grounded on the affidavit of Mr. McCarthy, and what is recorded in the transcript of the hearings.

19. By reason of the foregoing, I refuse the reliefs sought. Further, in light of my findings, I will hear the parties as to what is the appropriate order for costs to be made in the circumstances.