THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 793 J.R.]

BETWEEN

DARREN MCENTAGGART

APPLICATION

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Mr. Justice Binchy delivered on 20th day of April, 2018

1. On 9th July, 2016, the applicant was apprehended, along with others, while a passenger in a car that was stopped by gardaí at Main Street, Kingscourt, Co. Cavan. He was detained and conveyed to Bailieborough Garda Station. There he was charged by Sergeant John Patrick Callahan, pursuant to Charge Sheet No. 16890512 with an offence under s.15 (1) and (5) of the Criminal Justice (Theft and Fraud Offences) Act, 2001, and specifically that he had in his possession certain items with the intention that they would be used in the course of or in connection with a theft or burglary or an offence under s.17 of the Criminal Justice (Public Order) Act 1994.

2. The applicant was released on his own recognisance whereby he agreed to "appear before the District Court to be held at Virginia, the Courthouse, Virginia, Co. Cavan on the 26th day of July, 2016 at 10:30am/pm to answer the charge(s) as set out in the charge sheet attached and at every place and time to which during the course of the proceedings the hearing may be adjourned until my presence is no longer required to answer the said charge(s)."

3. The applicant then retained the service of a solicitor namely Mr Dermot Monahan, of Monahan & Co. solicitors, Drogheda. Mr Monahan swore an affidavit dated 14th June, 2017 in support of the applicant in these proceedings. In that affidavit he says that the applicant "consulted with me after he had been charged on 9th July and the full detailed attendance was taken in my office on 19th July. He was advised of his obligation to attend Virginia District Court in accordance with the terms of his bail, and, as I did not have other business in that court on that date it was necessary for me to make special arrangements to have him represented by a solicitor in Virginia District Court on 26th July. A legal aid application form was prepared and available and an effort was made to hand it into court in support of the application."

4. The applicant duly attended Virginia District Court on 26th July, 2016, as did the solicitor representing him, a Ms Taaffe. When the proceedings against the applicant were called, the Garda Superintendent attending the court on the day (a Superintendent McGinn) asked the District Judge to strike the proceedings out and to make no order. He did so because Sergeant Callahan was not available to give evidence of arrest, charge and caution of the applicant. While he had prepared a certificate pursuant to s.6 of the Criminal Justice (Miscellaneous Provisions) Act 1997 dealing with the issue of arrest, charge and caution, the certificate was not available to Court, owing to an administrative error. In an affidavit sworn on 11th May, 2017 in opposition to this application, Superintendent McGinn avers to all of the above and explains that it was for this reason that he applied for "no order" in the proceedings against the applicant.

5. The District Judge, as requested, made no order in the case, whereupon the solicitor for the applicant applied for legal aid. She informed the Court that the accused/applicant was in court. The District Judge responded that he had no jurisdiction to make any order as regards legal aid because the accused/applicant was not properly before the Court, to which the solicitor responded "very good. Thank you."

6. These proceedings arise out of the refusal by the District Judge to grant the applicant legal aid in the District Court proceedings. There is no dispute between the parties surrounding the circumstances giving rise to that refusal. However, the applicant claims that the District Judge should at least have considered his solicitor's application for legal aid. In support of this application, the applicant swore an affidavit dated 13th October, 2016. He avers that he is 42 years of age, married, and the father of seven children aged from eight years down to a baby. He is unemployed, on social welfare and struggling with an alcohol addiction. He had to leave school at the age of thirteen, and is not well educated.

7. He describes the circumstances leading to his arrest, and his subsequent release on station bail and attendance with his solicitor. He avers that the offence with which he was charged was serious enough to warrant his consultation with a solicitor, to take advice and to represent him before the court in Virginia. He avers that he was not informed beforehand of the intention of the prosecutor to withdraw the charge.

8. Mr Monahan, in his affidavit, avers that the applicant, having entered a recognisance, was required by the terms of his bail to attend before the Court in Virginia where his case was listed. He argues that the fact that the gardaí were not in a position to proffer evidence against the applicant at the hearing did not change the status of the applicant to a person other than a person who was before a court charged with an offence.

9. He avers that it is common place for District Judges, at the conclusion of a case, whether that conclusion be by way of conviction, acquittal, strike out, adjournment or otherwise to address the issue of legal aid. He avers that the practice of dealing with legal aid at the end of a matter helps the free flow of court business and allows District Judges to progress the substantive element of a case before dealing with ancillary matters. He says that in this case the prosecution applied at the beginning and without notice to strike out the charges against the applicant. He expresses the view that the fact that the prosecution did so when the case was first called did not undermine the applicant's entitlement to legal aid. He argues that the District Judge should, at the very least, have considered the application for legal aid having regard to the circumstances of the applicant and the nature of the charge against him.

10. In his affidavit, Superintendent McGinn refers to s.2 of the Criminal Justice (Legal Aid) Act 1962 which provides for the grant of legal aid as follows:-

"2(1) If it appears to the District Court –

(a) that the means of which a person is charged before it is an offence are insufficient to enable him to obtain legal aid, and

(b) that by reason of the gravity of the charge 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,

the Court shall, on application being made to it in that behalf, grant in respect of him a certificate 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 Court thinks fit) counsel assigned to him for that purpose in such manner as may be prescribed by regulations under section 10 of this Act.

(2) A decision of the District Court in relation to an application under this section shall be final and shall not be appealable."

Superintendent McGinn avers that there was no evidence before the learned District Court Judge that the accused was before the court "charged with an offence" and he avers that the District Judge was correct in concluding that he had no jurisdiction to grant the applicant legal aid because he was not, as the District Judge concluded, properly before the court.

11. That is the issue that the applicant now brings to this Court. On 17th October, 2016, the applicant was granted leave to apply for judicial review for the following reliefs:-

(1) An order of *certiorari* quashing the decision of the District Judge presiding at Virginia District Court on 26th July, 2016 to refuse legal aid to the applicant in relation to Charge Sheet No. 16890512.

(2) A declaration that the District Judge had the jurisdiction to consider the question of legal aid in relation to the applicant's case and/or he erred in law not so doing. The applicant was granted leave on the grounds that:-

(i) his circumstances are such as to entitle him to legal aid;

(ii) he was obliged to attend Virginia District Court on 26th July, 2016 in connection with an offence which, on summary conviction, carries a penalty of up to twelve months imprisonment and a fine of up to €2,500, and upon conviction on indictment, carries a sentence of up to fourteen years;

(3) The applicant was not given any advance notice that the proceedings against him would be struck out, and having engaged a solicitor in the days leading up to the court, the applicant attended court on 26th July, 2016 to meet the case against him;

(4) The District Judge fettered his discretion and should have at least considered the eligibility of the applicant for legal aid, and/or acted ultra vires by holding that he (the District Judge) had no jurisdiction in the matter.

12. In her statement of opposition delivered in May, 2017, the respondent claims that the District Judge was correct in determining that the applicant was not properly before the Court in circumstances where no evidence was placed before the Court as to the arrest, charge and caution of the applicant, and the court simply made no order (at the request of the prosecutor). The respondent relies on s.2 of the Criminal Justice (Legal Aid) Act 1962 and pleads that there was no evidence before the learned District Court Judge that the accused was before the Court "charged with an offence", and that the judge having made no order was correct in concluding that he had no jurisdiction to grant any other application including legal aid as the accused was, as the District Judge stated, "not properly before the court".

Submissions of the Applicant

13. The applicant argues that, while a District Judge cannot properly convict an accused in the absence of evidence as to arrest, charge and caution, the absence of such evidence, whether from the arresting garda or through the provision of a certificate issued pursuant to s. 6 of the Criminal Justice (Miscellaneous Provisions) Act, 1997, does not deprive the District Judge of all jurisdiction in the case.

14. The applicant relies upon the constitutional entitlement to legal aid as identified in the *State (Healy) v. Donoghue* [1976] 1 I.R. 325, as well as the more recent case of *Whelan v. Fitzpatrick* [2008] 2 I.R. 678. In the latter case, the District Judge had declined to entertain an application for legal aid on the grounds that he did not grant legal aid in driving cases. Budd J. held in this Court that the District Judge, in so doing, had "improperly fettered his own discretion and predetermined his decision and failed to embark on a proper inquiry as to the applicant's entitlement to legal aid." The applicant in this case submits that the District Judge behaved similarly in refusing legal aid without any consideration of the means or interests of the applicant, and by declining any further inquiry into the matter.

15. The applicant also relies upon the decision of the Supreme Court in *Carmody v. Minister for Justice* [2009] IESC 71, [2010] 1 I.R. 635, in which the Supreme Court determined that a defendant in a criminal prosecution before the District Court, has a constitutional right, prior to being tried, to apply for and have determined by a court or other appropriate body whether or not he should be granted legal aid to include representation by counsel as well as by a solicitor.

16. Finally, the applicant also relies upon s. 2(1) of the European Convention on Human Rights Act 2003 which provides:-

"In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."

17. Article 6 (3) of the European Convention on Human Rights provides:-

"Everyone charged with a criminal offence has the following minimum rights:

…

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

Submissions of the Respondent

18. The respondent does not dispute the entitlement of persons charged with criminal offences to make application for legal aid or to be granted legal aid in appropriate cases. The respondent's single argument in response to this application revolves around the interpretation of s.2 of the Criminal Justice (Legal Aid) Act 1962. Simply put, the respondent argues that the applicant was not, at the time that the District Judge refused to hear the application, in the words of the section, "a person charged before it [the District Court] with an offence". The respondent submits that when the District Judge indicated he was making no order in the matter, the applicant did not require to be legally represented as there was no charge against him before the court, and thus he did not require to be defended. Where no order was being made by the Court, the applicant did not require legal aid "in the preparation and conduct of his defence before it."

19. In advancing this argument, the respondent relies upon *Attorney General (McDonnell) v. Higgins* [1964] I.R. 374 in which Kingsmill Moore J. said at p. 393:-

> "This charge cannot be a complaint or information for it is not made before a District Justice, a Peace Commissioner or a Clerk. The charge sheet on which it is entered initiates as a purely police document and the entry of the offences charged is necessary for the protection of the garda to show that such offences justify arrest and detention in the barracks without warrant. Subsequently, when the charge sheet is put before the District Justice and the final two columns are utilised by him to record his decisions, it becomes a document of the court, but before the District Justice enters on the case it seems to me that there must be a complaint to him by some person, preferably but not necessarily the Superintendent, alleging the commission of the offences by the defendant with such particularity and details as are required by the authorities for a legal complaint. Only when this has been done is jurisdiction conferred to enter on the hearing of the case."

20. The respondent also relies upon the *State (Lynch) v. Ballagh* [1986] I.R. 203 in which Walsh J., having cited *Attorney General (McDonnell) v. Higgins* said that "the arrest and the charge sheet, so long as it remains a police document, does not confer jurisdiction."

Decision

21. This case is not about the entitlement, in principle, to legal aid, the entitlement to which, in appropriate cases, has long since been acknowledged and declared by the Supreme Court. The issue in this case revolves around the interpretation of s. 2(1)(a) of the Act of 1962. Specifically, was the applicant, on 26th July, 2016 a person charged with an offence before the District Court? If he was, then the Court had jurisdiction to entertain an application for legal aid, notwithstanding that the prosecutor asked the Court to make no order in relation to the charges on that date. If, however, the applicant was not before the Court charged with an offence on that date then the Court did not have jurisdiction.

22. The applicant had signed a form of recognisance whereby he agreed to appear before the District Court in Virginia on 26th July, 2016 to answer the charge as set out in the charge sheet attached to the form of recognisance. That form, and accompanying charge sheet clearly contemplate that the applicant will be charged at the District Court in Virginia on 26th July, 2016. But that did not occur. Instead what occurred was that the Superintendent indicated to the Court that he was seeking "no order" in the case, because he was not in a position to bring forward evidence of arrest, charge and caution of the applicant. It is true that the Superintendent also used the term "strike out" when addressing the Court i.e. he was asking the Court either to strike out the charges or to make no order. The term "strike out" is more accurately used when a charge is already before the court, such as when it has been proffered by way of summons.

23. There may be a degree of pedantry about this but it is clear from the authorities cited by the respondent and in particular the cases of *Attorney General (McDonnell) v. Higgins* and *the State (Lynch) v. Ballagh* that a charge is not brought until such time as the complaint is made to the court upon the appearance before the court of the person arrested and/or the presentation of the charge sheet to the court. It is only then that the court has any jurisdiction in the matter.

24. In my view the District Judge was correct in deciding that he had no jurisdiction. It is clear from the authorities relied upon by the respondent that neither a charge sheet nor a list of charge sheets is a court document. A list is prepared only for the expedience of the court and the gardaí. When a Superintendent indicates that a particular matter is not proceeding, for whatever reason, the Court has no jurisdiction to make any order (unless of course the charge has previously been proffered by the prosecutor, and jurisdiction assumed by the Court).

25. The applicant was acting responsibly in attending with a solicitor and preparing himself to deal with the charges that he had every reason to expect would be proffered against him at the District Court in Virginia on 26th July, 2016. His solicitor was also acting responsibly and, it may be said, in aid of the efficient conduct of court business, by taking instructions from the applicant in order to be able to deal with the charges on 26th July, 2016. Neither the applicant nor his solicitor anticipated that the State would not be in a position to proceed with the matter on that date, but be that as it may that is what occurred and, as a matter of law, there were therefore no charges against the applicant before the District Court on that date. The District Judge did not therefore have jurisdiction to entertain any application for legal aid.

26. Moreover, none of this could be in breach of the applicant's constitutional or Convention entitlements to legal aid, because those entitlements only arise once a person has been charged with a criminal offence. The application must therefore be dismissed.