THE HIGH COURT

[2010 No. 1490 J.R.]

BETWEEN/

GERARD BRETT

APPLICANT

AND

DISTRICT JUDGE COUGHLAN AND DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on the 9th June, 2011

1. This is an application to quash a decision of the respondent judge of 23rd November, 2010, whereby - it is contended - he refused to entertain a legal aid application brought on behalf of the applicant. The background to this application can be shortly stated as follows.

2. The applicant was originally charged before the Swords District Court on 7th September, 2010, to answer a charge of drunk driving contrary to s. 49(1) of the Road Traffic Act 1961. On 26th October, 2010, the applicant applied for legal aid before District Judge Brady. This application was refused, although it was recognized by the Court that the application was "financially a borderline case." Approximately one month later matters took a turn for the worse so far as the applicant was concerned, since he was then charged before the Swords District Court on 23rd November, 2010, with the offence of dangerous driving causing death, contrary to s. 53(1) of the Road Traffic Act 1961 (as amended). The prosecuting member, Garda Callan, informed the court that the charges would proceed on indictment.

3. There is no real conflict with regard to what happened next. The applicant's solicitor, Daniel Hanahoe, contends in his affidavit that the first respondent, District Judge Coughlan, refused to allow a legal aid application to be made. Mr. Hanahoe averred that the judge insisted that the matter had already been determined and that he emphasized that "it was noted on the court sheets that legal aid had been refused on the last occasion that the matter was before the court." When counsel for the applicant indicated that the circumstances had changed appreciably, the judge observed that he was not an "appellant court" and that the matter had already been determined.

4. The prosecuting member, Garda Callan, in an affidavit sworn on behalf on behalf of the Director of Public Prosecutions, averred that the judge did not refuse legal aid, but merely adjourned the prosecution to enable the preparation of the book of evidence. The District Court Clerk attached to the Swords District Court, Dermot O'Byrne, filed an affidavit in which he contended that the judge did not make an order refusing legal aid, but simply remanded the applicant on continuing bail pending the service of the book of evidence. It is, of course, formally correct to say that this is all that the District Judge actually ordered. But one cannot overlook the uncontradicted averments to the effect that the judge also refused the application on the ground that the matter was to all intents and purposes *res judicata*, even if this is not actually reflected in the perfected order of the District Court.

Section 2 of the Criminal Justice (Legal Aid) Act 1962

5. Section 2 of the Criminal Justice (Legal Aid) Act 1962 ("the Act of 1962")(as inserted by s. 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, 1997 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.".

6. Section 2(2) of the Act of 1962 further provides that:

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

7. The effect of s. 2(2) would appear to be that a decision on a legal aid application by a particular District Judge is a final decision of that Court *on that set of facts* which is not appealable and which, *to that extent*, creates a *res judicata*. Certainly, in the absence of a material change of circumstances, it was not open to the first respondent to alter the decision of District Judge Brady, even if he had wanted to do so. In that sense, the first respondent was quite correct to observe that he could not operate as a form of appellate court from a decision of one of his colleagues.

8. However, one cannot overlook the fact that there had been a material change of circumstances in the present case as between the decision of District Judge Brady in October, 2010 and the application before District Judge Coughlan in November, 2010. First, the

applicant was confronted with a new and significantly more serious charge - dangerous driving causing death - in respect of which the Director had elected for trial on indictment. Second, it is, perhaps, easy to overlook the fact that this was an entirely new charge which was never before District Judge Brady and in respect of which the Court had never previously ruled. Third, the circumstances had changed materially even in the case of the drink driving charge. This charge was now to be tried on indictment, in that it was to be added to the other count.

9. Any one of those factors would in themselves have justified the applicant in making a fresh application to the District Court: see, *e.g.*, by analogy the judgment of Feeney J. in *Joyce v. District Judge Brady* [2007] IEHC 149. There never had been any ruling in respect of the dangerous driving causing death charge and, in any event, the fact that the applicant was deemed to have had sufficient means to face the summary disposal of a drunk driving charge did not in itself mean that he had sufficient means to face the rigours of a jury trial on a far more serious count, where counsel would of necessity have to be retained and where the charge was unlikely to be disposed of within a day. Even the fact that the drunk driving charge was now to be tried on indictment in itself was a materially new factor which the Court would have to take into account, not least given the first decision regarding the adequacy of the applicant's means was itself considered to be a borderline one. The fact that the applicant might just about have had sufficient means to face a (relatively) short summary prosecution does not mean that he would necessarily have sufficient means to retain an appropriate legal team to face a jury trial which might run for two or three days.

10. It follows, therefore, that the District Judge fell into error by holding that he had no jurisdiction in the matter. He wrongly assumed that the matter was tantamount to *res judicata*, when in truth the combination of the new more serious count and the fact that the trial was now to be on indictment had changed the underlying circumstances entirely. In effect, therefore, the District Judge erred in law by failing to recognise that the application before the Court was, in truth, a fresh application so far as the new count was concerned and that there had been a material change of circumstances even with regard to the driving charge which, if they had been considered to be sufficiently material, would have enabled District Judge Coughlan to take a fresh view of the matter. By failing to recognise that he had jurisdiction in respect of this application, the District Judge thereby declined to rule on the matter in the manner required by law. It follows that his decision must, in principle, at least, be quashed by this court: see, *e.g.*, *Killeen v. Director of Public Prosecutions* [1997] 3 I.R. 218 at 228-229, per Keane J.

Whether the making of the order would be futile?

11. It is well established that the court will not grant certiorari where this would be a futile exercise conferring no practical benefit on the applicant: see, *e.g.*, *The State (Shannon Atlantic Fisheries Ltd.) v. McPolin* [1976] I.R. 93, *Hoffman v. District Judge Coughlan* [2005] IEHC 60, and *Burke v. Bourke* [2010] IEHC 451. But I cannot agree that the quashing of the decision made by District Judge Coughlan would not be of assistance to an applicant or that it would now be futile to quash the decision or that the decision has been rendered moot by reason of supervening events.

12. It is true that the applicant might have applied to the Circuit Court for legal aid, but even then this would have the disadvantage that even if the application were successful, any legal aid certificate would not have operated retrospectively. More to the point, however, if the decision were allowed to stand, this could well have conveyed the impression that the District Court had ruled conclusively on these issues, with the result that any member of that Court might have considered himself or herself bound by the earlier ruling of District Judge Coughlan, even so far as the new charge of dangerous driving causing death was concerned.

13. As the applicant is still clearly prejudiced (or, at least, potentially so) by this decision in that it may well affect his entitlement to a legal aid certificate from the District Court, it follows that it has not been shown that he will obtain no benefit were this decision to be quashed. This is not to suggest that the applicant should succeed were such an application to be made. Rather, all that has been decided is that, having regard to the developments outlined above, the decision of District Judge Brady can no longer be regarded as *res judicata* and that the applicant is entitled to apply afresh in the circumstances just described.

Conclusions

14. For these reasons, I am of the view that the first respondent fell into error in the manner indicated in refusing to entertain the application. I will accordingly quash that decision insofar as he declined to consider Mr. Brett's application for legal aid in respect of the dangerous driving charge and insofar as he held that he had no jurisdiction to revisit District Judge Brady's decision by reason of the fact that the drunk driving charge was now to be heard on indictment.