



THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 217

Kelly J
Finlay Geoghegan J.
Peart J.

2015/29

Between

Martha McEnery

Appellant

And

The Commissioner of An Garda Síochána

Respondent

Judgment of Mr. Justice Kelly delivered on the 16th day of October 2015

Introduction

1. This is an appeal from the judgment and order of Kearns P. dated the 20th November, 2014. He refused to grant *certiorari* to the appellant of a decision of the respondent to summarily dismiss her (subject to the consent of the Minister for Justice) from her post as a sergeant in the Garda.

Background

2. The appellant joined the Garda in July 1996. She was then 25 years old and was a university graduate. She was promoted to the rank of sergeant in 2008. She has a clear disciplinary record and in fact received commendations on a number of occasions during the course of her career in the police. The first of those was received while she was still on student placement in 1996. She is a single woman with no other means of livelihood apart from her Garda salary.

Criminal charges

3. In July 2011 the appellant together with three co-accused, all of whom were members of the Garda, stood trial at Waterford Circuit Criminal Court. The appellant (together with two of her co-accused) was charged with causing harm to one Anthony Holness contrary to s. 3 of the Non Fatal Offences Against the Person Act 1997. The third co-accused was charged with attempting to pervert the course of justice and with an offence contrary to s. 7(2) of the Criminal Law Act 1997, of carrying out acts with the intention of impeding the apprehension or prosecution of persons.

4. The trial took place before Her Honour Judge Reynolds and a jury. One of the appellant's co-accused was convicted of assaulting Mr. Holness contrary to s. 3 of the Non Fatal Offences Against the Person Act 1997. Another co-accused was acquitted of the same offence. The Garda charged with perverting the course of justice and the offence under s. 7(2) of the Criminal Law Act 1997, was convicted on both charges.

5. The appellant was acquitted of assault causing harm contrary to s. 3 of the 1997 Act, but was convicted of assault contrary to s. 2 of that Act.

6. Sentencing was postponed until November 2011. The appellant's co-accused who was convicted of the s. 3 offence was sentenced to three years imprisonment with eighteen months suspended. The co-accused convicted of perverting the course of justice was sentenced to two years imprisonment with twelve months suspended. The appellant was sentenced to four months imprisonment suspended for six months on condition that she enter into an oral bond in the sum of €200 to keep the peace and be of good behaviour for a period of six months.

7. On the 22nd November 2011, the appellant appealed against her conviction to the Court of Criminal Appeal. In October, 2012, the appeal was dismissed and the conviction upheld.

The first disciplinary proceedings

8. On the 20th November, 2011, two days prior to appealing against her conviction, the appellant was served with a notice issued pursuant to Regulation 39 of the Garda Síochána (Discipline) Regulations 2007, (the Regulations). That notice was signed by the Commissioner of the Garda and it stated that he intended to summarily dismiss the appellant, subject to ministerial consent, on the grounds that he considered her unfit for retention in the force.

9. That notice was responded to by the appellant's solicitor in which he pointed out that the appellant had appealed against her conviction and sentence and sought confirmation that the Commissioner would not proceed in the manner proposed in this notice pending a determination of her appeal. That request was refused and gave rise to judicial review proceedings. In those proceedings the Commissioner was enjoined from proceeding with the summary dismissal of the appellant pending the outcome of her appeal against her conviction and sentence.

The second disciplinary proceedings

10. Following the dismissal of the appellant's appeal by the Court of Criminal Appeal in October 2012, the respondent began fresh disciplinary proceedings.

11. On Christmas Eve 2012, the respondent issued a notice pursuant to Regulation 39 of the Regulations. This is what the notice said:

"1. I, Martin Callinan, Commissioner of An Garda Síochána, in accordance with Regulation 39 of the Garda Síochána (Discipline) Regulations, 2007 as amended, hereby give you notice that I propose, subject to the consent of the Minister for Justice and Equality, to dismiss you from An Garda Síochána on the grounds that I consider you unfit for retention in An Garda Síochána.

2. I am not in any doubt that you have committed the following breach of the Garda Síochána (Discipline) Regulations 2007:-

(a) Criminal conduct, that is to say, conduct constituting an offence in respect of which at Waterford Circuit Court on the 8th day of August, 2001, in front of Ms. Justice (sic) Reynolds, you were duly convicted of one count of assault contrary to the provisions of s. 2 of the Non Fatal Offences Against the Person Act 1997 and thereupon judgment was duly given on the 7th day of November, 2001 that you be sentenced to four months imprisonment suspended for six months on condition that you enter an oral bond in the sum of €200, to keep the peace and be of good behaviour for a period of six months and the oral bond having been entered by you in court on the 7th November, 2011.

The said criminal conduct is a breach of discipline within the meaning of Regulation 5 of the Garda Síochána (Discipline) Regulations, 2007 as amended, and is described therein at reference No. 17 in the Schedule to the said Regulations.

3. I am not in any doubt as to the material facts on which the above breach of discipline is based and the following is a summary of the evidence of the said material facts:-

(a) Certificate of conviction dated 9th November, 2011, (copy attached) issued by the Court Registrar for the County of Waterford, certifying that at a Circuit Court held at Waterford on the 8th August, 2011, you Martha McEnery of 59 Charles Wood, Mount Oval, Rochestown in the County of Cork were duly convicted of one count of Assault contrary to the provisions of s. 2 of the Non Fatal Offences Against the Person Act, 1997.

And thereupon judgment was duly given on the 7th November, 2011, that you be sentenced to four months imprisonment – suspend four month prison sentence for six months on condition you enter an oral bond in the sum of €200 to keep the peace and be of good behaviour for a period of six months.

(b) Notice of Result of Appeal dated 15th October, 2012, issued on behalf of Court Registrar from the Court of Criminal Appeal certifying that at the Court of Criminal Appeal on the 15th October, 2012, the appeal against conviction was dismissed.

4. I am not in any doubt as to the material facts relevant to the breach of discipline specified above and I have decided that the facts and the breaches are of such gravity as to merit your dismissal and that the holding of an Inquiry could not affect my decision.

5. In accordance with the provisions of para. (4)(c) of the Regulation 39, I hereby give you an opportunity of advancing to me, on or before the 21st day of January, 2013, reasons against the said proposed dismissal."

12. Appended to that notice was a certificate of the appellant's conviction and a notification of the result of the appeal to the Court of Criminal Appeal.

13. On foot of the invitation extended in the final paragraph of the Commissioner's notice, the appellant advanced reasons against the proposed dismissal. As a number of the submissions made have a bearing upon this appeal, I will reproduce the relevant parts of the submission in full:-

"Submissions as to breach of discipline and facts relied upon by the Commissioner

(a) Other members of the force have been convicted of assault contrary to s. 2 of the Offences Against the Person Act and those members have been permitted to remain in the force and it has not been considered appropriate to dismiss those members summarily. Insofar as the Commissioner is relying solely upon the fact of conviction rather than the circumstances giving rise to the conviction it is submitted that it would be arbitrary and unreasonable to dismiss Sergeant McEnery. There is nothing set out in the notice (as required by Regulation 39) to indicate the material facts which differentiate her case from other members who have received convictions for similar summary offences. It is submitted that the simple fact of conviction cannot in the circumstances be grounds for summary dismissal.

(b) From the notice provided to Sergeant McEnery it is submitted that the material facts have not been fully considered by the Commissioner. The Commissioner seeks to rely solely on the fact of conviction which is only one of the material facts. The circumstances giving rise to the conviction and the matters before the court at the time of conviction are also entirely relevant to the breach of discipline. It is submitted that in the circumstances the Commissioner cannot have considered all the facts where reliance is based solely on the certificate of conviction. It is submitted that in seeking to rely solely on the fact of the conviction the Commissioner has failed to have any regard to a significant amount of facts material to the breach of discipline. Further, the Commissioner in relying on the certificate of conviction is wrongfully delegating his functions under the Regulations.

(c) Sergeant McEnery accepts the findings of the jury and further accepts that those findings have an equivalence to a finding of a breach of discipline on her part. However, Sergeant McEnery submits that a board of inquiry established pursuant to Part 3 of the Regulations could and ought properly consider a lesser sanction than the one proposed. In effect the finding of the jury in the Circuit Court could be summarised as a finding that Sergeant McEnery had used 'unreasonable force' in the arrest of Anthony Holness. Sergeant McEnery accepts that this use of unreasonable force is a breach of discipline which requires sanction. It is submitted that not every member who has been found to have used unreasonable force has been disciplined by way of dismissal. It is submitted that having considered the evidence before the Circuit Court (or such other evidence as the board wished to call) and having considered any submissions made by or on behalf of Sergeant McEnery a Board of Inquiry ought properly recommend either a reduction in rank or possibly a reduction in pay as the appropriate sanctions. In making such a submission Sergeant McEnery is not seeking in any way to ignore the gravity of her conviction or the circumstances giving rise to it, but submits that the board of inquiry, considering the totality of the facts leading to that conviction, would not recommend dismissal as the appropriate

sanction. It is noteworthy that the jury in the Circuit Court, having considered all the evidence, acquitted Sergeant McEnery of the more serious charge of assault causing harm and this fact and the evidence leading to that acquittal are of direct relevance to the sanction which ought to be imposed.

(d) Sergeant McEnery submits that the holding of an inquiry would affect the decision of the Commissioner for the reasons set out above and also for the reason that Sergeant McEnery would be in a position to adduce evidence as to her previous good character and disciplinary record and in particular the following facts:

(a) Sergeant McEnery formed the intention to join the force on leaving school, but in light of the fact that there was no recruitment taking place she completed a psychology degree in University College Dublin before joining the force at the age of 25 on the 29th July, 1996 and was promoted to Sergeant in 2008.

(b) Sergeant McEnery has received numerous commendations over the course of her career, the first being received while she was still on student placement in 1996.

(c) Sergeant McEnery has never been in breach of discipline before.

(d) In addition Sergeant McEnery would submit that her personal circumstances should and ought to be considered prior to any final sanction. Regard ought to be had to the effect that she is a single woman with no other means of support or livelihood. She has dedicated herself to her career in An Garda Síochána.

(e) Further it is submitted that a board of inquiry ought to have consideration of the impact of the conviction on Sergeant McEnery. Sergeant McEnery has been on suspension at 75% pay since the 9th March, 2010. Unfortunately this reduction in pay has meant that continuing to pay her mortgage on her home is no longer a reality and Sergeant McEnery is faced with the prospect of having to sell in the near future. In addition there has been a severe impact on Sergeant McEnery's social life and that of her parents. Sergeant McEnery accepts that this is a direct consequence of her own actions, but submits a board of inquiry, or the Commissioner, ought properly to consider these matters prior to any decision on sanction.

(f) It is submitted that convening a board of inquiry pursuant to Part 3 of the Regulations would be the fairest and most just course in all the circumstances. Sergeant McEnery, having received the advice of this office and of senior counsel, formally acknowledges and accepts that board (sic) if it was so inclined, would not have to call on any witnesses to give evidence in order to making findings against the applicant but could rely on the transcript of the proceedings in the Circuit Court and Sergeant McEnery would not object in any way to such reliance. The sole proviso is that Sergeant McEnery might be advised to give evidence herself to the board. Further Sergeant McEnery would seek to call evidence in relation to mitigation. It is submitted therefore that the establishment of a board of inquiry would not be onerous in all the circumstances."

14. The submission made to the Commissioner contained a summary which read as follows:-

"Summary

The High Court has indicated that the provisions of Regulation 39 are to be exercised in only the rarest of circumstances. It is accepted that a conviction for s. 2 of the Offences Against the Person Act, is not a commonplace within the force. However, it is not unheard of. Indeed other members have received convictions for the same offence and have not been dismissed.

Sergeant McEnery accepts the gravity of the breach of discipline with which she is charged. She accepts the breach in substance. Further she accepts fully that the breach is a serious breach requires (sic) some form of sanction. However, she submits firstly that the Commissioner has not complied with the provisions of Regulation 39, in that he has not set out clearly the material facts in relation to the breach of discipline.

It is submitted that the receipt of a criminal conviction does not as a matter of course give rise to immediate and summary dismissal from the force. If that were to be the position, then the regulations ought to make clear provision in that regard. It is submitted further that use of unreasonable force, without any consideration of the circumstances, cannot and has not heretofore, given rise in the ordinary course to the summary dismissal of a member of the force.

Sergeant McEnery would welcome the opportunity to expand on her grounds for mitigation of the sanction. In so doing, she formally consents to the reliance by any board of inquiry on the evidence already heard before the Circuit Court.

It would appear that there is no mechanism under Regulation 39 for Sergeant McEnery to propose an alternative sanction. She fully accepts that a sanction is merited. Sergeant McEnery would happily accede to any course which would permit the consideration of such sanctions and allow her to remain in the career to which she has dedicated her adult life."

15. These submissions did not succeed in altering the views of the respondent. On the 25th March, 2013, his decision in that regard was communicated by letter to the appellant's solicitor. The letter said:-

"Having considered your submissions the Commissioner is not prepared to alter his decision that the conduct of your client in this instance merits her dismissal from An Garda Síochána in accordance with the provisions of Regulation 39 of the Garda Síochána (Discipline) Regulations, 2007 as amended.

The Commissioner, accordingly, has decided to proceed with his decision to seek the requisite consent of the Minister for Justice and Equality to dismiss your client in accordance with the said Regulation 39."

16. Following that communication the instant judicial review proceedings commenced and resulted in a reserved judgment being delivered by Kearns P. on the 20th November, 2014. It is from that judgment that this appeal is taken.

Statutory Framework

17. The power to dismiss members of the Garda is reserved to the Commissioner by the Garda Síochána Act 2005 (the Act) and the Garda Síochána (Discipline) Regulations 2007 (the Regulations).

18. Section 14 of the Act provides that:-

"(1) The Garda Commissioner may appoint, subject to and in accordance with the regulations, such numbers of persons as he or she sees fit to the ranks of garda, sergeant and inspector in the Garda Síochána.

(2) Notwithstanding anything in this Act or the regulations, the Garda Commissioner may dismiss from the Garda Síochána a member not above the rank of inspector if –

(a) the Commissioner is of the opinion that –

(i) by reason of the member's conduct (which includes any act or omission), his or her continued membership would undermine public confidence in the Garda Síochána, and

(ii) he dismissal of the member is necessary to maintain that confidence,

(b) the member has been informed of the basis for the Commissioner's opinion and has been given an opportunity to respond to the stated basis for that opinion and to advance reasons against the member's dismissal,

(c) the Commissioner has considered any response by the member and any reasons advanced by the member, but the Commissioner remains of his or her opinion, and

(d) the Government consents to the member's dismissal.

(3) Subsection (2) is not to be taken to limit the power to make or amend Disciplinary Regulations."

19. It is common case that it is Regulation 39 of the Regulations dealing with summary dismissal which was utilised in the present case. It reads as follows:-

"39(1) Notwithstanding anything in these regulations and without prejudice to s. 14(2), the Commissioner may, subject to this regulation, dismiss from the Garda Síochána any member (not being above the rank of inspector) whom he or she considers unfit for retention in the Garda Síochána.

(2) The power of dismissal conferred by this regulation shall not be exercised except where –

(a) the Commissioner is not in any doubt as to the material facts and the relevant breach of discipline is of such gravity that the Commissioner has decided that the facts and the breach merit dismissal and that the holding of an inquiry under these regulations could not affect his or her decision in the matter,

(b) subject to paragraph (3), disclosure of the facts relating to the breach would, in the opinion of the Commissioner, be liable to affect the security of the State or to constitute a serious and unjustifiable infringement of the rights of another person, or

(c) the member concerned has failed to attend for duty over such a period and in such circumstances that it can be presumed that his or her intention has been to abandon his or her membership of the Garda Síochána.

(3) In a case referred to in paragraph (2)(b), the Commissioner shall consider whether, in the interests of the member concerned, some special inquiry can be held into the relevant breach of discipline which would not affect the security of the State or constitute a serious and unjustifiable infringement of the rights of another person.

(4) The power of dismissal conferred by this regulation shall not be exercised –

(a) where the member concerned has completed his or her period of probation, without the consent of the Minister,

(b) where paragraph 2(a) applies, without the member concerned being informed of the material facts and the relevant breach of discipline, and

(c) except where paragraph 2(c) applies or where, despite reasonable efforts to do so, the whereabouts of the member concerned have not been established, without the member being given an opportunity of submitting to the Commissioner reasons against the proposed dismissal."

20. No suggestion is made in the present case that the relevant regulation is any way defective in law or *ultra vires*. Neither is it suggested that the Commissioner does not have the necessary power to apply the provisions of Regulation 39 in an appropriate case. Indeed it is accepted that the Commissioner is entitled to summarily dismiss without holding an inquiry provided that the circumstances identified in Regulation 39 are met.

21. It is to be noted that in *State (Jordan) v. Commissioner of the Garda Síochána* [1987] ILRM 107, O'Hanlon J. held the predecessor of the current regulation which also provided for summary dismissal to be perfectly permissible. He said:-

"I am of opinion that special considerations apply in relation to the power of the State to dispense with the services of members of the armed forces, or the Garda Síochána and of the Prison Service because it is of vital concern to the community as a whole that the members of these services should be completely trustworthy. For this reason, I take the view that it was permissible to confer on the Commissioner of the Garda Síochána the exceptional powers contained

in Regulation 34 of the Discipline Regulations 1971, but I also accept the contention of counsel for the prosecutor that the scope for making use of these powers must be very limited in character. Presumably, if the Commissioner were to witness a grave breach of discipline committed in his presence he would be justified in dispensing with the holding of an inquiry. Similarly, as was accepted by counsel for the prosecutor, if the member against whom it was proposed to exercise the power of dismissal admitted that he was guilty of a serious breach of discipline, the Commissioner could lawfully act upon the faith of such admission without resorting to the time consuming process of the inquiry machinery which is outlined in the regulations.

In such circumstances there could not be said to be a denial of natural or constitutional justice, since the member concerned has an opportunity to deal with the facts which are regarded as constituting a grave breach of discipline and makes it clear by his own admission that these facts do, indeed, apply to his case."

22. I agree with these views of O'Hanlon J. both as to the permissibility and necessity of having a power of summary dismissal and as to the very limited scope for making use of that power.

The Notice

23. The notice of Christmas Eve 2012 alleges a breach of discipline within the meaning of Regulation 5 of the Regulations against the appellant. Regulation 5 reads:-

"Any act or conduct by a member which is mentioned in the Schedule constitutes a breach of discipline."

24. The Schedule to the Regulations identifies 30 instances of acts or conduct constituting breaches of discipline. The one which is relied upon by the respondent in this case is No. 17. That reads:-

"Criminal conduct, that is to say, conduct constituting an offence in respect of which there has been a conviction by a court."

25. Having alleged the breach of discipline by reference to regulation 5 and identified that breach by reference to item No. 17 in the Schedule, the notice then proceeds to set out the material facts upon which the breach of discipline is based. The breach of discipline alleged is the criminal conduct which resulted in the conviction before Her Honour Judge Reynolds. The material facts upon which that breach of discipline is based is, as set out in the notice, the certificate of conviction at Waterford Circuit Court and the certificate of the dismissal of the appeal against that conviction from the Registrar of the Court of Criminal Appeal.

26. Thus it can be seen that in the notice the breach of regulations and the facts upon which the breach is based are treated as being one and the same. The appellant contends that the respondent has conflated the breach of discipline and the facts upon which it is based thereby denying her the opportunity of having the facts or conduct which gave rise to the conviction taken into consideration. It is not that she denies the conviction or denies that the conduct which gave rise to the conviction is a breach of discipline. She has no desire or ability to make such denials. But she does contend that she is entitled to have taken into consideration the material facts or conduct which gave rise to the conviction. The appellant is at pains to point out that this will not involve any form of rehearing of the material dealt with in the Circuit Court. But it would involve a consideration of the transcript of the evidence there and the ability on the part of the appellant to adduce evidence of her own circumstances and character.

The judgment of the High Court

27. In the High Court the trial judge considered the terms of the Regulations and in particular Regulation 5, Regulation 39 and item 17 in the Schedule to the Regulations.

28. The President, in my view correctly, pointed out that it is not for the courts to decide what amounts to conduct sufficient to warrant the summary dismissal of a Garda. That is a matter solely for the Garda Commissioner and the Minister (See *Galvin v. The Commissioner of An Garda Síochána* [2011] IEHC 486 and *Stroker v. Doherty* [1991] 1 I.R. 23). The President then went on to consider Regulation 39 of the Regulations giving the Commissioner the power of dismissal without an inquiry. He said:-

"In the instant case the applicant cannot reopen the fact of her conviction which, it should be noted, was the subject matter of an unsuccessful appeal to the Court of Criminal Appeal. As is clear from the notice from the Commissioner dated the 24th December, 2012, he did in fact consider the applicant unfit for retention in An Garda Síochána and was not in any doubt as to the material facts constituting the breach of discipline involved, namely, criminal conduct in the form of an assault contrary to s. 2 of the Non-Fatal Offences Against the Person Act 1997.

As long ago as 1987 it had been acknowledged that while the existence of such a summary power of dismissal was 'unusual and exceptional' it was necessary.

29. He then quoted the passage from O'Hanlon J. in *State Jordan v. Commissioner of An Garda Síochána* [1987] ILRM 107 which I have already cited. The President continued:-

"A conviction of assault on a member of the public would certainly appear to fall within the limited category of cases where the exercise of such a power is warranted.

However, the main ground of complaint raised by the applicant is that the Commissioner acted in breach of fair procedures and constitutional justice in that he relied solely on the fact of conviction and failed to have regard to any other considerations, including the possibility of a lesser sanction than dismissal. The applicant had also claimed she was aware of other members of An Garda Síochána having in the past been acquitted of assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997 and, like her, having been convicted of assault simpliciter contrary to s. 2 of the same Act who were not in fact dismissed."

30. The President then considered the discovery in the case which showed the position in relation to four Gardaí convicted of assault. Two of them resigned. One had no decision taken in relation to disciplinary action as yet and the fourth was the appellant. The President then said:-

"Thus the Court is not satisfied that the applicant has made out any factual basis for holding that her treatment has been discriminatory or disproportionate in comparison with any other case.

Insofar as the imposition of some lesser penalty is concerned, it remains the fact in the instant case that the applicant

was invited to and did make submissions to the Commissioner which submissions were considered and taken into account by the Commissioner in reaching the decision which he did in this case. In such circumstances, his decision cannot be said to fail a rationality test as the same is understood in the context of judicial review."

31. The judgment then went on to consider a complaint concerning paucity of reasons.

Discussion

32. Section 14 of the Act confers a power of dismissal on the respondent in respect of every member of the Garda not above the rank of inspector. The exercise of that power is not subject to the unfair dismissals legislation and members of the Garda have no recourse open to them in that regard save by way of judicial review.

33. The power of summary dismissal provided for in Regulation 39 is, as was stated by O'Hanlon J., an exceptional one. It is also one which may only be used in "very limited" circumstances.

34. The Regulations contain comprehensive procedures for dealing with Garda indiscipline. In the case of serious breaches of discipline they provide *inter alia* for the establishment of a board of inquiry and in turn an appeal board. This would be the normal method for dealing with serious breaches of discipline. Summary dismissal is dealt with in Part 4 of the Regulations and in its terms is an exceptional power thus underscoring the correctness of the view of O'Hanlon J.

35. The only check on the exercise of the power of summary dismissal by the respondent is the fact that he is required to seek consent from the Minister for Justice before giving effect to a decision to dismiss. The Regulations are silent as to what information, if any, may be sought by the Minister. Neither do they provide any entitlement on the part of a Garda to make representations to the Minister seeking to have consent refused. Thus, as already noted, the only recourse which is available to a Garda who is subject of a summary dismissal under regulation 39 is that of judicial review.

36. Given the very limited recourse which is available to a Garda who is subject to a summary dismissal under Regulation 39, the exceptional nature of the power given to the Commissioner and the very limited scope for the exercise of that power, the courts on judicial review ought to be astute to ensure that the power is exercised properly and in accordance with law.

37. The principal point which is made on this appeal is that the respondent has confused and conflated two quite separate matters namely, the material facts and the relevant breach of discipline.

38. It is to be noted that in order for the respondent to decide to invoke the summary dismissal powers under Regulation 39, he must not be "*in any doubt as to the material facts **and** the relevant breach of discipline is of such gravity that the Commissioner has decided that the facts **and** the breach merit dismissal and that the holding of an inquiry under these regulations could not affect his or her decision in the matter*". (My emphasis). Thus, on the plain wording of regulation 39, the Commissioner must not be in any doubt as to (i) the material facts and (ii) that the relevant breach of discipline is of such gravity that both "*the facts **and** the breach merit dismissal*" before the power of summary dismissal can be exercised. (My emphasis). This requirement emphasises the distinction between the material facts as referred to in Regulation 39 and the breach of discipline. The Commissioner must also have decided that "*the holding of an inquiry under these regulations could not affect his or her decision in the matter*".

39. In the Regulation 13 notice of Christmas Eve 2012, the respondent stated that he considered the appellant unfit for retention in the Garda and that he was in not doubt as to the material facts constituting the breach of discipline involved, that breach being criminal conduct namely, assault contrary to s. 2 of the Non Fatal Offences Against the Person Act 1997. (See para. 2 of the notice).

40. At para. 3 of the notice the respondent expressed himself as not being in any doubt as to the material facts on which the breach of discipline was based and set out a summary of the evidence of the said material facts. The summary was exclusively confined to the certificate of conviction and the notice of the result of the appeal against that conviction.

41. The appellant contends that the certificate of conviction cannot in and of itself amount to all the material facts. I am of the opinion that this is correct. Such a certificate gives no information as to the nature of the assault, the manner in which it occurred or the circumstances which gave rise to the jury acquitting the appellant of the s. 3 offence and convicting under the lesser s. 2 or any other material facts.

42. I am of the view that the respondent in this case has indeed conflated two matters upon which he has to be satisfied under Regulation 39. He must not be in any doubt as to the material facts and the relevant breach of discipline being of such gravity that the facts and breach merit summary dismissal. This requires him to consider not just the conviction (or criminal conduct) which constitutes the breach of discipline but also the material facts which may be extraneous to the actual breach but nevertheless material.

43. The respondent decided to proceed under Part 4 of the Regulations. By so doing he concluded that the holding of an inquiry under the Regulations could not affect his decision in the matter. That is a matter for the respondent. Having so decided he is obliged to proceed in a lawful manner. I am of opinion that he did not do so. By treating the material facts and the breach of discipline as one and the same he blinkered himself from a consideration of material facts. That was in breach of the requirements of Regulation 39 and of the appellant's right to have the material facts which gave rise to the breach of discipline fully considered.

Decision

44. I would allow this appeal. In my view the respondent was not correct in law for the reasons which I have given. His decision to dismiss the appellant from the Garda ought to be quashed. I would so order. Such an order does not preclude the respondent from taking whatever lawful steps are deemed appropriate concerning the appellant pursuant to the Regulations.