



THE COURT OF APPEAL

[UNAPPROVED]

Court of Appeal Record No. [2018/154]

**Birmingham P
McCarthy J
Donnelly J**

BETWEEN/

SHANE COFFEY

APPELLANT

-AND-

A JUDGE OF THE DISTRICT COURT

FIRST RESPONDENT

-AND-

THE MINISTER FOR JUSTICE AND EQUALITY

SECOND RESPONDENT

JUDGMENT of Mr Justice McCarthy delivered on the 25th day of February 2022

1. This is an appeal from the judgment and order of Meenan J refusing the applicant's ("Mr Coffey") application for *certiorari* of a decision of District Judge Halpin of the 28th of April 2015 whereby he refused to grant (as it is put in the order granting leave) "*a separate legal aid (District Court) certificate on case no. 20157686 this being a separate prosecution commenced by Garda Reilly*".
2. Mr Coffey was charged on the 18th of April 2015 on National Charge Sheet No. 15642852 with an offence of assault contrary to section 2 of the Non-Fatal Offences

Against the Person Act 1997 and on National Charge Sheet No. 15642845 with an offence of breach of the peace contrary to section 6 of the Criminal Justice (Public Order) Act 1994 by a Garda Hampson (“the Garda Hampson Charges”). Mr Coffey was granted station bail and was to attend at Dublin Metropolitan District Court on the 27th of April 2015 but failed to appear. A Bench Warrant was issued to procure his attendance. On that occasion his solicitor, Mr Aonghus McCarthy, appeared; an application for legal aid was not made since Mr Coffey was not present.

3. On the same day Mr Coffey was charged by a Garda O’Reilly (“the Garda O’Reilly Charges”) on National Charge Sheet No. 15673017 with the offence of theft contrary to section 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001 and also on National Charge Sheet No. 15673082 with the offence of failing to appear in court on that day contrary to section 13 of the Criminal Justice Act 1984. Mr Coffey was kept in custody overnight and brought before the District Court on the 28th of April where the bench warrant was executed. On that occasion Mr Coffey was represented by counsel (instructed by Mr McCarthy). A transcript of what transpired before District Judge Faughnan is before us. There were accordingly a multiplicity of charges before the court arising from events on different dates.

4. Counsel made an application for legal aid on the 28th of April which was granted; the exchange between counsel and Judge Faughnan was in these terms: -

“I will also be making an application for legal aid Judge, in the name of Aonghus McCarthy Solicitors” to which the judge replied “Aonghus McCarthy. Very good”.

5. In due course a Legal Aid (District Court) Certificate in the form prescribed by the Criminal Justice (Legal Aid) Regulations 1965, as amended, was issued in favour of Mr

Coffey and Mr McCarthy was assigned. That certificate referred to the following three charges: -

1. 2005/71638 Charge Sheet Number: Store Street 15642853
2. 2015/76870 Charge Sheet Number: Bridewell Dublin 15673082
3. 2015/76868 Charge Sheet Number: Clontarf 15673017

6. Case numbers were assigned by the court and these were set out in addition to the charge sheet numbers. The Legal Aid number assigned was L:2015/19121. Under the heading “*prosecutors associated with this legal aid certificate*” each Garda was referred to. This document is also by its terms the order of the court. Legal aid did not extend pursuant to that certificate to the charge of engagement in threatening, abusive or insulting words or behaviour with intent to provoke a breach of peace contrary to section 6 of the 1994 Act, as amended (one of Garda Hampson’s charges). By its terms the District Court judge had acceded to counsel’s application in respect of the charges before him, apparently with that exception. Meenan J addressed what had occurred at paragraph 22 of his judgment as follows: -

“The crucial fact in these proceedings is that on 28th April, 2015, both the Garda Hampson Charges and the Garda Reilly Charges were before the District Court and the District Judge granted one Legal Aid Certificate in respect of both sets of proceedings. When the matter came before the first named respondent there were no new charges. In these circumstances the applicant was facing charges that were already subject to an existing Legal Aid Certificate.”

7. It seems that Mr McCarthy anticipated what might be described as separate certificates in respect of Garda Hampson’s charges and those of Garda Reilly deriving as

they did from separate events or at least laid by different Gardaí on the 18th of April and the 27th of April respectively, even though all were before the court at the same time; this was on the basis of what Mr McCarthy says was in accordance with the ordinary practice of the District Court on a day-to-day basis.

8. Judge Faughnan's order has not been impugned and since all charges have long since been disposed of one assumes that payment was made on foot of the certificate, albeit an ultimate payment in an amount lesser to that which might (and only might) have been anticipated if different certificates were given in respect of different charges or groups thereof flowing from separate incidents.

9. Mr McCarthy, having seen what he regarded as a discrepancy on receipt of the certificate, made application to Judge Halpin on the 26th of May 2015 when the matter was next before the court and the following exchange took place in that regard: -

“Mr McCarthy: There is an application for legal aid in respect of Garda O'Reilly's matter, judge. It was assigned in Garda Hanson's (sic) matter.

Judge Halpin: You are assigned in Garda O'Reilly's matter.

Mr McCarthy: There is one certificate for legal aid judge that covers both Garda Hanson and Garda O'Reilly. I would ask for a separate certificate in relation to –

Judge Halpin: No, one certificate will do. Okay.

Mr McCarthy: Well judge, they are separate prosecutions unrelated in time unrelated in relation to the Gardaí and they would require certain disclosure, so I would ask for a second certificate in those circumstances.

Judge Halpin: I think one certificate will do. Okay. Thank you.”

10. That exchange had no bearing upon the fact that the earlier certificate, pursuant to a grant of legal aid, still stood and insofar as a so-called separate certificate was sought it

would constitute the grant of legal aid twice in respect of the three matters referred to in the first issued pursuant to Judge Faughnan's order. It is obvious that as held by Meenan J there is no power to grant legal aid twice in respect of the same charge.

11. Given the terms of the earlier exchange on the 28th of April between Judge Faughnan and counsel, it is possible that having regard to the want of specificity in counsel's application for legal aid and the judge's response thereto, the judge did not direct his mind to whether or not the charges should be dealt with separately with consequent separate legal aid certificates. It is legitimate for a party to appear before a judge who has made an order to speak to it and in particular to seek an amended order or indeed an altogether new order, if that drawn up does not reflect the actual intention. This is a different thing from an application under the so-called slip rule which pertains merely to clerical errors. Reference is made in this context to *Richards v O'Donohoe* [2017] 2 IR 157 and in particular the portion of her judgment (page 171) where O'Malley J said: -

"...I agree with Birmingham J and with the observations of Geoghegan J in Kennelly v Cronin [2002] 4 I.R. 292 that the sheer volume of cases dealt with in the District Court and, on appeal, the Circuit Court, requires the availability of a relatively informal mechanism for the correction of mistakes and misunderstandings. The problem is to define the parameters of the jurisdiction, having regard to current court listing systems, the necessity to observe fair procedures, the necessity to act rationally, and the requirement to give reasons."

12. It is submitted that in truth by the application to Judge Halpin, Mr Coffey's solicitor was seeking to "implement" District Judge Faughnan's decision, using such an "informal mechanism". I simply do not know whether or not there was a mistake or misunderstanding. If there was a difficulty the judge to whom recourse should have been

had was Judge Faughnan. It seems reasonable to characterise any such application to Judge Faughnan as falling into the category of such a mechanism.

13. Reference has been made also in this context to the presumption of constitutionality; it is suggested that Judge Faughnan would have been presumed to have acted to ensure that Mr Coffey's constitutional rights were protected; there is no basis for suggesting that because a judge makes an order sought by a party less extensive than that party might have wished but not articulated a constitutional issues arises.

14. The breach of the peace might well have been a charge to which he intended the certificate to extend; it is possible, alternatively, that the omission thereof from the certificate was a clerical error. In this instance having regard to the want of specificity of the application and the response of the judge thereto, I do not know whether he intended more than one certificate; he signed the order and certificate in any event. This did not preclude a return to the judge for the purpose of submitting that the order did not reflect his intention. In any event, that course was not adopted, and it is too late now on any rational yardstick.

15. The question therefore arises as to whether or not Judge Halpin acted within jurisdiction in refusing to grant legal aid (a second time in respect of the same charges). Meenan J rightly took the view that he did; in substance he held that what occurred was an application for a second certificate in respect of Garda Reilly's charges; one could use informal terms such as "split", "extension" or "extending" but I agree with the respondent's suggestion that no such concept is known to the law. If Judge Halpin had purported to "extend" an existing certificate he would have been wrong; *Miroslav Horvath v District Judge Brian Smith and another* [2015] IEHC 16 is good authority to this effect [there the judge purported to "extend" an existing legal aid certificate to additional charges – it was rightly argued that this was unknown and that if anything the appropriate course

was to consider whether a further certificate should be granted]. Herein, that is not what occurred, a valid application was made before Judge Faughnan to which he acceded; from first principles that was the end of the matter. The position would be quite different, of course, if legal aid had not previously been granted. The application would then rank as one *de novo* and Judge Halpin would then have had an application upon which he would adjudicate in the ordinary course.

16. One of the charges (that pertaining to breach of the peace) was not the subject of the certificate and order of Judge Faughnan; if a separate application had been made before Judge Halpin in respect of that charge, in terms, then Judge Halpin would have had an obligation to adjudicate upon it, separately. In fact, it was expressly said that legal aid had been assigned in “*Garda Hanson’s (sic) matter*”. Whether or not he would have granted legal aid in respect of such a charge on the merits, might well be open to doubt but that is not the point. The theoretical possibility of making a separate application in respect of that charge has not been addressed so that in that sense it does not arise for this Court. In truth the substance of the matter was the assault charge from the same date.

17. There has been much debate in the case as to the extent of the rights of parties, either under the Criminal Justice (Legal Aid) Act 1962 or the Constitution, as first elaborated in *State (Healy) v Donoghue* [1976] IR 325 as to the circumstances in which a party ought to be provided with legal assistance by the State. None of this in my view is relevant on the present facts. No one doubts the right; it might well be appropriate, in fact, in a proper case, to grant legal aid “separately” if additional work might be involved in the case of more than one set of charges. If in some sense Mr McCarthy was underpaid, so to speak, for his work here that is attributable to the original order’s terms and raises no issue as to the structure of the Act or regulations or the approach taken by Judge Halpin.

18. The issue of *locus standi* has been raised by counsel for the Minister. In particular it is contended that Mr Coffey has no *locus standi* to impugn Judge Halpin's order because Mr Coffey will not receive any benefit by the granting of the relief sought and that Mr McCarthy will be the sole beneficiary. I think that this proposition is wrong. I think that this can be seen from the terms of the Certificate itself – one hardly needs to go further than it; legal aid was expressly granted to Mr Coffey and it was on his behalf that any applications were made to the District Court. The benefit of legal aid is conferred upon him even though it is achieved by payment of his lawyers by the State. In this regard I think that the observation of Henchy J in *State (Healy) v Donoghue* quoted in Mr Coffey's submissions to the effect that the Criminal Justice (Legal Aid) Act 1962 was "*designed to give practical implementation to a constitutional guarantee*" and that this guarantee would be "*...incompletely exercised if a bare or perfunctory application of it left the constitutional guarantee unfulfilled*" is key. Furthermore, in *Ward v The Minister for Justice and Equality* [2017] IEHC 656, it was pointed out that the certificate is an entitlement of the accused and not of their chosen solicitor and this is correct. In addition, Baker J pointed out in *Ward* that the right was not merely a right to be represented by a solicitor of one's choice but that if one had such a right it was a right which extended to the right to have the chosen solicitor paid.

19. I do not think that it would be competent for the Minister to rely upon the proposition that, ultimately, no prejudice was suffered by Mr Coffey because he was competently defended by Mr McCarthy even though he might well have been paid a larger amount if a multiplicity of certificates had been granted – something which does not necessarily follow in any event – given the nature of his right, and with particular reference to *Ward*.

20. It has been contended also on behalf of the Minister that what is sought to be done here by impugning Judge Halpin's order is to collaterally attack the earlier order of Judge

Faughnan. I do not think that this is the case. Manifestly on any view the application made was for legal aid when it was canvassed before Judge Halpin and the question was whether or not in the light of the fact that it had already been granted, Judge Halpin could take any further step in the matter.

21. One cannot however make bricks without straw, so to speak, there can be no deprivation of the right if an application of sufficient specificity was not made to allow a court to adjudicate on the issue (as occurred before Judge Faughnan). This is not a case about the rates of pay for legal aid work and in particular whether or not there might be a breach of rights by reason of inadequate payment.

22. An argument as to mootness was not advanced in the High Court and I am not disposed to entertain it here.

23. I would accordingly dismiss both the appeal and the cross-appeal.

24. Costs in both courts are awarded to the Minister for Justice and Equality subject to any submission in writing to be filed within ten days as a result of which the Court may revisit the matter.

25. The President and Ms Justice Donnelly concur with this judgment.