

THE HIGH COURT

[2022] IEHC 32

[Record No. 2018/588 JR]

BETWEEN

ANNE CONNORS

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered electronically on the 18th day of January, 2022.

Introduction.

1. The applicant was convicted in the District Court of having in her possession a twelve-inch screwdriver and gloves at Leopardstown Avenue, Dublin on 14th April, 2016, with the intention that they should be used in the course of a burglary, contrary to ss. 15(1) and (5) of the Criminal Justice (Theft and Fraud Offences) Act 2001.
2. On appeal, the applicant's conviction was affirmed in the Circuit Court. It is against the ruling and decision made by the learned Circuit Court judge, that this judicial review has been brought. While a number of grounds of challenge were advanced in the applicant's statement of grounds, at the hearing of this matter, her challenge to the hearing in the Circuit Court was refined to the following grounds: -
 - "1. *That the Circuit Court judge erred in law and acted ultra vires by holding that the ambiguity in the charge sheet concerning the gloves was not fatal to the prosecution case.*
 2. *That the Circuit Court judge erred in law and acted ultra vires by holding that the solicitor for the applicant should have enquired with the DPP in relation to the ambiguity in the charge sheet in advance of the hearing;*
 3. *That in all the circumstances, the conviction was imposed in breach of the applicant's rights to natural and constitutional justice and in particular to her right to a fair trial in accordance with law."*
3. The applicant's key submission was that the charge sheet on which she was prosecuted was ambiguous because it only referred to possession of "gloves" simpliciter. In this case there had been two sets of gloves found by the Gardaí. The first pair of gloves was found in the car in which the applicant had been the driver. The second pair of gloves was found in the foot well in the rear of the garda car in which the applicant had been transferred from the scene following arrest and brought to Blackrock Garda Station. It was submitted that in light of this ambiguity, the applicant had been prejudiced in the conduct of her defence at the hearing of the appeal before the Circuit Court.
4. The essence of the respondent's submission was that while the charge sheet might have been more precisely drafted, the essential point was whether there was any material prejudice caused by any perceived ambiguity in the wording of the charge sheet. It was submitted that that had been addressed by the judge in the Circuit Court, who had asked

counsel for the applicant what prejudice the applicant had suffered by the phrasing of the charge in the charge sheet; to which inquiry, he had failed to point to any material prejudice. It was submitted that in the circumstances of the case and in particular, in light of the evidence that had been given at the trial in the District Court and at the hearing of the appeal, there had been no confusion in relation to which pair of gloves were the subject of the charge.

5. It was submitted that in these circumstances the trial judge had acted within jurisdiction in ruling against the applicant in her application for a direction and when no further evidence was called, the trial judge had been entitled to proceed to convict the applicant on the evidence before her. It was submitted that there were no grounds on which the court should interfere with the decision of the learned Circuit Court judge.

The charge.

6. The charge which the applicant faced, as set out in charge sheet number 16667139 of Blackrock Garda Station, was in the following terms:

"Offence charged: That you the said accused/defendant, on the 19/04/2016 at Leopardstown Avenue, Dublin in the said District Court area of Dublin Metropolitan District, when not at your place of residence, did have in your possession an article, to wit a twelve-inch screwdriver and gloves with the intention that it be used in the course of a burglary, contrary to section 15(1) and (5) of the Criminal Justice (Theft and Fraud Offences) Act 2001."

Summary of evidence given in the Circuit Court.

7. The following is a brief summary of the evidence that was given before her Honour Judge Elma Sheahan at the hearing of the appeal on 17th April, 2018. The main prosecution witness was D/Garda Dermot Haugh. He stated that on 19th April, 2016, he had been driving his personal vehicle on the M50, when he observed a brown Nissan Almera, bearing registration number 06 D 37569, driving erratically. The Nissan Almera overtook his vehicle and as it passed, he noted that the driver of the vehicle was the applicant. He noted that the front seat passenger was one Andy Connors, in respect of whom there was an outstanding bench warrant. There were three other passengers in the rear of the vehicle.
8. D/Garda Haugh followed the Nissan Almera off the M50 as it proceeded down Leopardstown Road and then onto Brewery Road. At a set of traffic lights it turned right onto Leopardstown Avenue. D/Garda Haugh lost sight of the vehicle momentarily, as he was not able to proceed through the traffic lights. He contacted a colleague, Garda Timothy McAuliffe, to inform him that the passenger, Mr. Connors, had a live bench warrant in existence. When the lights changed, D/Garda Haugh made his way onto Leopardstown Avenue and then onto Leopardstown Drive, where he noted the Nissan Almera parked on the left hand side of the road, with the applicant still sitting in the driving seat. He observed that the rear passenger door on the left hand side was open and a young female, Mary Connors, a daughter of the applicant, was standing beside the open rear left hand side passenger door.

9. The witness stated that he observed two males, Andy Connors and one Timmy O'Brien, walking away from the car across the road. He noted that Andy Connors was wearing a pair of black gardening gloves and carrying a twelve-inch long screwdriver. He had his face covered with a green neck warmer, or snood, that he had pulled up over the lower part of his face. The witness observed that Timmy O'Brien also had his face covered and was wearing black gardening gloves.
10. D/Garda Haugh stated that he believed that he was seen by these two individuals, as they ran back to their car and drove off. D/Garda Haugh followed the vehicle as it attempted to drive away. It was stopped a short distance later by Garda McAuliffe, who had arrived in a patrol car. Just prior to that happening, D/Garda Haugh saw the screwdriver, which he had seen in Andy Connors' hand, being thrown from the front passenger window.
11. Details of the occupants of the Nissan Almera were taken. There were three adults and two minors. Mr. Andy Connors provided the gardaí with a false name at the scene. D/Garda Haugh seized the screwdriver that had been thrown from the vehicle and upon searching the Nissan Almera, found a pair of black gardening gloves, shoved down behind the front passenger seat. He gave the gloves exhibit number DH2 and placed them in a sealed evidence bag. D/Garda Haugh then arrested the applicant and placed her in the rear of the patrol car. She was conveyed to Blackrock Garda Station by Garda Orla Meehan. There were a number of other items found at the scene, including a sock, £140 in cash and Garda McAuliffe found a green snood in the front pocket of Andy Connors' jeans.
12. Garda Orla Meehan gave evidence that she had been tasked with transporting the applicant to Blackrock Garda Station after her arrest. She stated that on the journey, the applicant continuously fidgeted and moved forward in her seat. Garda Meehan had to tell her to desist from this activity on a number of occasions. The applicant's daughter, who was approximately ten years of age, was also brought to the station in the rear of the patrol car.
13. After the applicant had been detained in the garda station, Garda Meehan searched the patrol car and found a pair of black gloves in the rear passenger foot well of the car, where the applicant had been sitting. She stated that prior to taking up her role as driver of the patrol car that day, she had inspected the exterior and interior of the vehicle and had found no items in it. When she checked the vehicle after the applicant had been brought to Blackrock Garda Station, she found the gloves in the rear foot well of the car. She placed the gloves in an evidence bag and handed them to D/Garda Haugh. D/Garda Haugh had previously given evidence that that exhibit was marked OM1 and was placed in a sealed evidence bag. Garda Meehan stated that she had had no other prisoners in the car prior to the applicant being placed therein. In cross-examination, Garda Meehan accepted that she could not categorically say that the applicant's ten-year-old daughter had not placed the gloves in the foot well. She had also accepted that following her arrest at the scene, the applicant had been handcuffed with her hands behind her back.

14. When D/Garda Haugh had given evidence in relation to that pair of gloves being placed in an evidence bag, Ms. McDermott, who was prosecuting the case on behalf of the respondent, had clarified that the gloves found in the patrol car by Garda Meehan were the gloves the subject matter of the charge.

Submissions made by counsel on behalf of the applicant at the trial.

15. The applicant was represented at the appeal hearing in the Circuit Court by Mr. Padraig Langsch BL. At the conclusion of the prosecution evidence, he made an application for a direction. He made that application on a number of grounds, one of which was to the effect that there was an ambiguity in the charge sheet as to which pair of gloves was referred to in the charge. On this aspect the following exchange occurred between counsel and the judge: -

"Counsel: Which brings me to the third submission, which is the charge sheet itself. The charge sheet in this question, in this case, refers to an alleged possession of a screwdriver and gloves. There is, I will submit to the court a genuine ambiguity in this case whether the charge refers to the first pair of gloves or the second pair of gloves, and I think my friend actually in her submission tried to clarify that it is actually the second, but the way the charge sheet is constructed would indicate that it is actually the first, given the fact that the address on the charge sheet and the locus of the alleged incident is the same as the screwdriver, and say well in those circumstances the prosecution cannot have it both ways. They can't simply pick and choose in the middle of a hearing which gloves, which pair of gloves it was, and I say the first pair of gloves would be..."

Judge: Was your client disadvantaged, was this issue raised at any point before this?

Counsel: Well it would be disadvantaged in my respectful submission.

Judge: Well was this question raised at any point in advance of the trial in the District Court or the Circuit Court?

Counsel: Well, justice, I wasn't at the de novo hearing so I wouldn't know if it was raised in the District Court.

Judge: No, no, but did your solicitor write looking for a precis of the evidence or ask which gloves are we talking about?

Counsel: I don't, I don't have that instruction, Judge, in relation to that.

Judge: Okay. Well that is something that should be known.

Counsel: But it would be – in my respectful submission it would be then on the prosecution to amend the charge sheet or make an application to amend the charge sheet. There can't be..."

Judge: The issue is whether or not your client is at a disadvantage if it is not known. But you are not in a position to say whether your solicitor found this out or not."

Submissions on behalf of the applicant.

16. In his submissions to this Court, Mr. McGinn SC on behalf of the applicant, submitted that the key issue was that there had been an ambiguity in the charge sheet. There had been two pairs of gloves found in connection with the incident. The first pair of gloves had been found on a search of the Nissan Almera, which was carried out when the vehicle had been stopped on Leopardstown Avenue. The second pair of gloves had been found following a search of the garda patrol car by Garda Meehan on her return to Blackrock Garda Station. The charge sheet was ambiguous in relation to which pair of gloves the applicant was accused of being in possession of, as it merely stated that she had been in possession of a twelve-inch screwdriver and "gloves" at Leopardstown Avenue on the date in question.
17. It was submitted that the position adopted by the prosecution at the trial, that the charge sheet related to the set of gloves found in the patrol car, was inconsistent with the evidence from Garda Haugh that he arrested the applicant at the roadside for possession of both the screwdriver and the gloves, which was at a time when only the gloves which had been recovered, had been those found in the Nissan Almera.
18. It was further submitted that an unfairness arose in circumstances where the applicant had to attempt to mount a defence to such an ambiguous charge.
19. Counsel referred to the Criminal Justice (Administration) Act 1924, which set out the position in relation to the particularisation of an indictment. It provided in s.4(1) as follows: -

"Every indictment shall contain and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charges."
20. It was submitted that while the present case concerned a charge sheet rather than an indictment, it was submitted that the rationale behind s.4 of the 1924 Act should still apply, especially in circumstances where the matter was being heard on appeal to the Circuit Court.
21. It was further submitted that insofar as the learned Circuit Court judge had asked questions which tended to imply that there was an onus on the defence solicitor to clarify which set of gloves were referred to in the charge sheet, that had effectively reversed the onus of proof. It was submitted that the onus of proof lay on the prosecution to prove all elements of the charge and, save in exceptional and defined circumstances, it did not transfer over to the defence to clarify the specifics of the charge against an accused. In this regard counsel referred to the well-known dictum of Viscount Sankey L.C. in *Woolmington v. DPP* [1935] AC 462 at p.481-482:

"Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal no matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

22. Finally, it was submitted that where there was an ambiguity in the charge sheet and as a result the accused was prejudiced in relation to the conduct of her defence, the ensuing trial was one that had been held in breach of her right to fair procedures. It was submitted that on all these grounds, the court should set aside the ruling and verdict of the learned Circuit Court judge.

Submissions on behalf of the respondent.

23. In response, Mr. Oisín Clarke BL submitted that the gravamen of the applicant's complaint appeared to be that she was prejudiced due to the ambiguous wording of the charge, as contained in the relevant charge sheet. However, it was submitted that other than a bare assertion of prejudice that had been made by counsel for the applicant in his submission to the Circuit Court judge, he had not been able to point to any material or specific prejudice that had been suffered by the accused in the conduct of her defence.
24. It was submitted that when one looked at the transcript of the hearing in the Circuit Court, it was clear that counsel who had represented the applicant at that hearing, had had instructions in relation to the pair of gloves that had been found by Garda Meehan in the garda patrol car and had conducted a detailed cross-examination in relation to that aspect. In particular, he had cross-examined on the physical feasibility of the applicant removing the gloves from her person and placing them in the foot well of the car, when her hands were handcuffed behind her back. He had also canvassed with Garda Meehan the issue that one could not exclude the possibility that the gloves had been placed in the foot well by the applicant's daughter, who was also travelling in the rear of the patrol car.
25. It was submitted that in the circumstances of this case, it had been clear that the gloves that were referred to in the charge sheet were the second set of gloves that were found in the patrol car. Counsel for the applicant had not been able to point to any specific prejudice that had been suffered by his client in the conduct of her defence due to any ambiguity that there was in the wording of the charge in the charge sheet.
26. It was submitted that the provisions of O.38 of the District Court rules gave the judge dealing with the summary matter in the District Court a wide power of amendment and power to adjourn the hearing if that was necessary, or the judge could proceed notwithstanding that there may be some variance, defect or omission in the summons, warrant or other document. Order 38 is in the following terms:

"(1) Subject to the provisions of paragraph (3) hereof, in cases of summary jurisdiction no variance between the complaint and the evidence adduced in support thereof, as to the time at which the offence or cause of complaint is stated to have been committed or to have arisen, shall be deemed material, provided that such information or complaint was in fact made within the time limited by law for making the same; nor shall any variance between the complaint and the evidence adduced in support thereof, as to the place in which the offence or cause of complaint is stated to have been committed or to have arisen, be deemed material, provided that the said offence or cause of complaint was committed or arose within the jurisdiction of the Judge by whom the case is being heard, or that, the accused resides or in the case of an offence was arrested within such jurisdiction. In any such case the Court may amend the summons, warrant or other document by which the proceedings were originated and proceed to hear and determine the matter.

(2) Subject to the provisions of paragraph (3) hereof, no objection shall be taken or allowed on the ground of a defect in substance or in form or an omission in the summons, warrant or other document by which the proceedings were originated, or of any variance between any such document and the evidence adduced on the part of the prosecutor at the hearing of the case in summary proceedings or at the examination of the witnesses during the preliminary examination of an indictable offence, but the Court may amend any such summons, warrant or other document, or proceed in the matter as though no such defect, omission or variance had existed.

(3) Provided, however, that if in the opinion of the Court the variance, defect or omission is one which has misled or prejudiced the accused or which might affect the merits of the case, it may refuse to make any such amendment and may dismiss the complaint either without prejudice to its being again made, or on the merits, as the Court thinks fit; or if it makes such amendment, it may upon such terms as it thinks fit adjourn the proceedings to any future day at the same time or at any other place."

27. It was submitted that in the circumstances of this case, where there had been no material prejudice to the applicant in the conduct of her defence due to the wording of the charge sheet, the trial judge had acted entirely within jurisdiction in rejecting the applicant's submission in this regard. It was submitted that all that had ever been put forward on behalf of the applicant was a bare assertion that she had been prejudiced in the conduct of her defence due to the wording in the charge sheet. She had never pointed to any material prejudice. In this regard, counsel referred to the decision in *Rostas v. DPP* [2021] IEHC 60, where Humphreys J had held that when one was considering an amendment to a charge sheet or summons, it is not sufficient that any assertion of prejudice will do, it has to be prejudice rendering the amendment unjust.

28. Finally, counsel submitted that this was a judicial review application which was concerned with the decision making process. Even if the court disagreed with the decision that had been reached by the learned Circuit Court judge, that was a decision that had been made within jurisdiction and therefore there was no basis for the court to interfere with it by way of an order of *certiorari*, as the decision had been open to the trial judge on the evidence presented to her and was therefore a decision that was made within jurisdiction.

Conclusions.

29. There were two sets of gloves in this case. At the time of the arrest of the applicant at the scene, the only gloves that had been found were the gardening gloves that had been found following the search of the Nissan Almera. However, by the time that the applicant was charged at Blackrock Garda Station, a second set of gloves had been found by Garda Meehan, following her search of the patrol car in which she had transported the applicant to the Garda Station. She had handed the gloves to D/Garda Haugh. There was evidence that those gloves had not been in the garda car prior to the applicant being put into it at Leopardstown Avenue, Dublin.
30. Thus, the charge sheet was correct to state that the applicant was charged with possession of these gloves at Leopardstown Avenue, notwithstanding that at the time of her arrest they had not been discovered. She must have had them in her possession at Leopardstown Avenue, in order for them to find their way into the garda patrol car, in which they were found following the search by Garda Meehan of the patrol car at the garda station. So the location specified in the charge sheet does not only apply to the gloves found in the Nissan Almera. It also applies to the gloves subsequently found in the patrol car.
31. While one could argue that there was some ambiguity in the phraseology used in the charge sheet as to which set of gloves were referred to in the charge, the court is satisfied that there was no prejudice to the applicant in the conduct of her defence at the trial. It was clear from the content of counsel's cross-examination on the appeal, that he had instructions in relation to the gloves found in the garda car. In particular, he had cross-examined on the difficulty that would have been faced by the applicant in taking them out of her pocket or elsewhere, when her hands were handcuffed behind her back. He also cross-examined on the possibility that the applicant's daughter may have had them and may have put them onto the floor of the garda car. Thus, there was no prejudice to the applicant in the conduct of her defence caused by any perceived ambiguity in the wording in the charge sheet. It is clear from the transcript that everyone proceeded on the basis that the gloves referred to were those found in the garda car, rather than those found in the Nissan Almera.
32. In the course of the hearing, the trial judge addressed the issue of prejudice. She specifically asked counsel for the applicant whether the applicant had suffered any prejudice due to any confusion in the wording of the charge sheet; to which counsel for the applicant gave what can only be described as a very vague assertion of general prejudice. The court accepts the submission made by counsel on behalf of the respondent that a vague assertion of prejudice is not sufficient.

33. In *Rostas v. DPP* the applicant challenged an amendment that had been made by the District Court judge to the charge sheet. The amendment effectively involved the excision of words that were superfluous to the charge. It did not affect the specifics of the charge, nor the matters which the prosecution had to prove to establish the commission of the offence. In rejecting the submission that the applicant had been prejudiced by the amendment, Humphreys J. stated as follows at para. 33: -

"... Fundamentally the problem for the applicant is that not just any old prejudice will do. It has to be prejudice rendering the amendment unjust: see DPP v. Corbett (No. 2) [1992] I.L.R.M. 674 at 678, per Lynch J, who made the point that 'the day is long past when justice could be defeated by mere technicalities which did not materially prejudice the other party'. In this specific context Finlay P. in The State (Duggan) v. Evans held that if the defect did not mislead or prejudice or affect the merits of the case, the judge 'must either amend the document or proceed as if no defect, variance or omission had existed', viewing the requirement to rectify as imperative rather than discretionary in such circumstances."

34. Even if there were an error or defect in the charge sheet, the District Court can proceed to amend it, or can ignore the defect, save if the amendment would cause a prejudice to the accused in the conduct of their defence: see O.38 of the rules.
35. In this case there was only the barest of assertions of prejudice. There was no reality to that assertion. The facts upon which the charge that had been made against the applicant were clearly set out. Those facts had been given in evidence in the District Court. They were repeated in the evidence of the Gardaí given in the Circuit Court. It was very clear what gloves were referred to in the charge. The applicant's counsel was able to carry out a full cross-examination in respect of the issues surrounding the alleged possession of the gloves found in the garda patrol car. The court is satisfied that there was no prejudice caused to the applicant in the conduct of her defence due to the way in which the charge was phrased in the charge sheet.
36. In relation to the second ground of challenge put forward on behalf of the applicant, to the effect that the trial judge had reversed the onus of proof by asking the applicant's counsel whether he or his solicitor had asked the respondent at any stage to clarify which set of gloves were referred to in the charge sheet, the court is not satisfied that there is any substance to this argument. The learned judge hearing the appeal merely asked counsel whether enquiries had been made on this aspect. Counsel for the applicant was unable to say whether any such enquiries had been made on behalf of the applicant. The court is satisfied that this was a reasonable enquiry for the judge to have made. It did not involve the reversal of the burden of proof in any way.
37. In *Rostas v. DPP*, Humphreys J. made it clear that trial judges are not prevented from asking questions in the course of a trial. He stated as follows at para. 41: -

"...Judges don't have to sit immobile, silent and impassive. They can ask questions, raise or tease out issues, manage the hearing to ensure fairness of procedures as

they see fit, and so on. Obviously, that needs to be understood as something being done in the interests of justice and not in a partisan spirit...”.

38. The court is satisfied that the interaction that there was between the trial judge and counsel for the applicant in the course of the hearing, was not inappropriate and did not involve any reversal in the burden of proof. Accordingly, the court rejects this ground of challenge to the decision.
39. As the court is satisfied that the wording of the charge sheet was not ambiguous, as it was clearly understood by all concerned that the gloves referred to in the charge were those that had been found by Garda Meehan in the patrol car and as the court is further satisfied that there was no prejudice to the applicant in the conduct of her defence due to any perceived ambiguity in the wording of the charge sheet, the court is not satisfied that there was any breach of her right to a fair trial.
40. It is important to realise that judicial review is not an avenue for a further appeal against a decision made by a trial judge. This was made clear in *ER v. DPP* [2019] IESC 86, where Charleton J., delivering the majority judgment of the Supreme Court, stated as follows at paras. 17 and 18: -

“17. As will emerge from the section which follows, an accused in a criminal trial who is advised to forego an appeal and instead pursue a judicial review, faces a burden different to an argument as to right and wrong. Judicial review is not about the correctness of decision-making, nor is it the substitution by one court of a legal analysis or factual decision for that of the court under scrutiny. On judicial review, where successful, the High Court returns the administrative or judicial decision to the original source and, implicitly in the judgment overturning the impugned decision, requires that it be redone in accordance with jurisdiction or that fundamentally fair procedures be followed. If the decision-maker has no jurisdiction, that may be the end of the matter but the High Court never acts as if a Circuit Court case were being reconsidered through a rehearing, which is a circumstance where a court will be entitled to substitute its own decision. Judicial review is about process, jurisdiction and adherence to a basic level of sound procedures. It is not a reanalysis.

18. Thus, as the pleadings in this case make clear, and as discussed in the next section of this judgment, incumbent on the applicant ER is the substantial burden of showing not an error of fact or a decision of law made in the course of the hearing that might be incorrect, but the deprivation of a right. For the Director of Public Prosecutions to introduce into that existing equation required to be met by an applicant for this relief in the High Court, that judicial review does not lie in the context of decisions validly made by the trial judge in the course of a criminal trial is essentially a development of the burden which ER already undertook in pursuing judicial review as a remedy.”

41. The court is satisfied that the ruling of the trial judge on the application for a direction and the verdict which was reached by the trial judge in this case, were made within jurisdiction. The decision and verdict reached were open to her on the evidence that she heard. She was entitled to weigh that evidence in the way that she thought appropriate. The court is satisfied that the trial judge considered all the evidence that was before her and was entitled to reach the verdict that she did. This court will not interfere with that verdict.
42. Accordingly, the court refuses all of the reliefs sought by the applicant in her statement of grounds.
43. As this judgment is being delivered electronically, the parties will have two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.