[2019] IEHC 745

THE HIGH COURT

[2018 No. 1033 JR.]

BETWEEN

PHILIP MCGUIRE

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered on the 8th day of November, 2019

1. This is an application for an Order of *certiorari* by way of judicial review quashing the decision to convict the applicant pursuant to s. 19 of the Criminal Justice (Public Order) Act 1994 as amended by the s. 185 of the Criminal Justice Act 2006, imposed on the applicant on 19th October, 2018, at Virginia District Court, County Cavan, on foot of charge sheet number 18358873. The applicant seeks an Order quashing the Order made on that date and seeks to have the matter remitted for rehearing in the District Court.

2. In the charge sheet the offence was described in the following manner:

> *"Offence charged: that you the said accused/defendant, on 27/06/2017 at Virginia Courthouse Main Street Virginia, Cavan in the Virginia, did resist one Garda Mark Higgins a peace officer acting in the execution of his duty, knowing all being reckless that he was a peace officer acting in the execution of his duty, contrary to s. 19 of the Criminal Justice (Public Order) Act, 1994 (as amended by s. 185 of the Criminal Justice Act 2006)."*

3. When the matter came on for hearing before the District Court sitting in Virginia, County Cavan, the applicant was not present, as he was attending an alcohol dependency unit at Cuan Mhuire, Newry, County Down. However, he was represented by his solicitor, Ms. Catherine Taaffe. The prosecution was represented by Inspector Valerie Gahan. She indicated to the judge that her witnesses were available in Court and they were in a position to proceed with the case. The District Court judge indicated that he would deal with the case. The matter was let stand to second call.

4. The prosecution commenced later in the day. Ms. Taaffe gave the following account of the evidence tendered at the trial: Garda Mark Higgins was the first prosecution witness. He gave evidence that the applicant had resisted arrest and had assaulted him by injuring his thumb. He was not cross-examined. The next witness was Garda Padraig Gorman, who gave similar evidence to that given by Garda Higgins. He was not cross-examined either. Garda Tom Tighe gave similar evidence and stated that the applicant was "*quite strong*". In cross-examination Garda Tighe confirmed that the applicant was a gentleman in his 70s.

5. Sergeant Ciara Hayes gave evidence that she was not present when the incident took place, but that the incident had been reported to her and she detailed the injury suffered by Garda Higgins. Inspector Gahan indicated to the Court that that was the conclusion of the prosecution's case.

6. At the conclusion of the prosecution's case, Ms. Taaffe on behalf of the applicant made a submission to the judge. From her note of the evidence and from listening to the DAR Recording which had subsequently been furnished to her, Ms. Taaffe has put together a record of what was said at that time. I am satisfied that this record represents a reasonably accurate account of what was said, having regard to the DAR Recording which was played in open court. Her transcription of that recording is in the following terms:

> *"Ms. Taaffe:- Judge I do have an application, just in respect of […] he is charged with s. 19 of the Criminal Justice Public Order Act.*
>
> *Judge:- I think it was quite clear from the evidence that the case being pursued against Mr. McGuire was the lesser [or latter] offence. I am satisfied on the evidence that the case has been made out and I am going to convict. For the purposes of sentencing I am issuing a bench warrant.*
>
> *Ms. Taaffe:- For the purposes of clarification, will the Court just clarify what conviction is being recorded? Is it a s. 19 […]*
>
> *Judge: Section 19 (1).*
>
> *Ms. Taaffe: But Judge that is not reflected in the charge sheet. On the charge sheet it is just s. 19 and there was application by the State to amend the charge sheet.*
>
> *Judge: There is actually a case on this Ms. Taaffe and I am satisfied that I am entitled, that I have jurisdiction to hear the case despite the fact s. 19 (1) is not set out on the charge. As I said I am going to issue a bench warrant for the purposes of sentencing.*
>
> *Ms. Taaffe: I am not aware of the case. Would the Court mind just clarifying what case?*
>
> *Judge: That is for you to find out Ms. Taaffe.*
>
> *Ms. Taaffe: Thank you Judge."*

7. By letter dated 22nd October, 2018, the applicant's solicitor requested a copy of the court Order in respect of the applicant's case. The Order which was furnished to her did not record that any conviction had been entered against the applicant, but merely noted that it had been ordered that the accused be arrested and brought before Judge McLoughlin or another Judge to be dealt with according to the law.

8. By letter dated 25th October, 2018, the applicant's solicitor wrote again to Cavan Court Office seeking clarification on the Order. She informed them that on 19th October, 2018, Judge McLoughlin having heard the State's evidence in the absence of the accused, had convicted him for an offence under s. 19 (1) of the Criminal Justice (Public Order) Act

1994. She requested a copy of the District Court Order made on 19th October, 2018, which detailed the conviction recorded on that date.

9. By letter dated 30th October, 2018, a response was received from Cavan Court Office in which it was stated that the Order which had been furnished was not an arrest warrant, it was an Order setting out the Order of Judge McLoughlin made on 19th October, 2018. The letter went on to state:

> *"While Judge McLoughlin may have indicated during the hearing that he had decided to convict and require the attendance of the accused for sentencing, his only formal Order was to issue a Warrant to Arrest. If the Judge had imposed any penalty this would have bene [sic] reflected in the Order."*

10. By letter dated 7th November, 2018, the applicant's solicitor informed Cavan Court Office that according to their note, a conviction had been entered by the Judge, whereby the applicant was convicted of an offence contrary to s. 19 (1) of the 1994 Act. The letter went on to state that it was clear that the Court's intention was to have the applicant arrested for sentence only, such that there would be no revisiting of the issue of guilt or innocence subsequent to arrest. They were asked to provide an Order which reflected this state of affairs. By letter dated 12th November, 2018, Ms. Taaffe wrote to Sergeant Ciara Hayes and Inspector Gahan, stating that it was her view that the applicant had been unfairly convicted of an offence pursuant to s. 19 (1) of the 1994 Act, as he had not been properly notified about the charge. It stated that notwithstanding that, the learned District Court Judge had been amenable to convict the defendant of the said offence. They did not accept that he had jurisdiction to do so in all the circumstances. The prosecuting Gardaí were told that Ms. Taaffe was sending the case to counsel in order to advise as to what further steps should be taken in the matter. She suggested that they might also consult their legal advisors. It may well be that it was due to that latter piece of advice, that neither Sergeant Hayes nor Inspector Gahan responded to that letter.

The Present Application

11. The relevant parts of s. 19 of the Criminal Justice (Public Order) Act 1994 (as amended by s. 185 of the Criminal Justice Act 2006) are as follows:

> *"19. Assault or obstruction of peace officer.*
>
> *(1) Any person who assaults or threatens to assault [...] (c) a peace officer acting in the execution of a peace officer's duty knowing that he or she is, or being reckless as to whether he or she is, a peace officer so acting [...] shall be guilt of an offence.*
>
> *(2) A person guilty of an offence under subsection (1) shall be liable –*
>
> *(a) Having elected for summary disposal of the offence, on summary conviction, to a fine not exceeding €5,000 or to imprisonment for a term not exceeding 12 months, or to both,*

> (b) *On conviction on indictment, to a fine or imprisonment for a term not exceeding 7 years or to both.*
>
> (3) *Any person who resists or wilfully obstructs or impedes [...] (c) a peace officer acting in the execution of a peace officer's duty, knowing that he or she is or being reckless as to whether he or she is, a peace officer so acting... shall be guilty of an offence.*
>
> (4) *A person guilty of an offence under subsection (3) shall be liable on summary conviction to a fine not exceeding €2,500 or to imprisonment for a term not exceeding 6 months or to both."*

12. The applicant has sought *certiorari* of his conviction of an offence contrary to s. 19 (1) of the 1994 Act (as amended) on the grounds that the District Court Judge did not have jurisdiction to deal with the matter under that subsection in the District Court, in the absence of an election by the applicant that the charge could be dealt with summarily. In response to this assertion, it was conceded by counsel on behalf of the respondent that if the District Court Judge had in fact purported to convict the applicant of an offence contrary to s. 19 (1), the respondent could not stand over such conviction as the applicant had not been put to his election as was mandated by s. 19 (2).

13. However, it was submitted on behalf of the respondent, that it was clear from all the circumstances of the case, including the particulars of the charge as set out in the charge sheet and the evidence given by the prosecution witnesses and in the statement by the Judge that he was convicting the accused of the lesser or latter charge, that he had in fact convicted the applicant of the offence stipulated in s. 19 (3). The fact that he had indicated in his discussion with the applicant's solicitor that the conviction was pursuant to s. 19 (1) was clearly an error, whereby the learned Judge had simply identified the wrong numerical subsection, but it was clear that he intended to convict of the lesser offence, which was that set out in s. 19 (3).

14. In this regard, the respondent relied upon an affidavit sworn by Inspector Valerie Gahan on 19th June, 2019, wherein she set out the central plank of their defence to this application in the following terms:

> *"5. I can confirm that, as stated in the charge sheet, it was the charge of resisting a peace office [sic] that was pursued against the accused contrary to s. 19 (3) of the Criminal Justice (Public Order) Act 1994.*
>
> *6. The accused was never prosecuted for assault contrary to s. 19 (1) of the said Act in respect of the incident the subject matter of these proceedings. For this reason, the DPP's Directions were never sought nor adduced to the trial court, during the pre-trial stages of this prosecution, and the accused was never placed on his election, as would have been mandated for such a charge by virtue of s. 185 of the Criminal Justice Act 2006."*

15. In response to that submission, senior counsel on behalf of the applicant submitted that it was simply not possible to state with any certainty which of the two charges set out under s. 19 of the 1994 Act, the applicant had been convicted of. While the trial judge had indicated that he was convicting the applicant of the "*lesser [or latter] charge*", when asked for clarification as to which exact offence he meant, he had stated s. 19 (1) twice. When the applicant's solicitor sought clarification on this matter from the Court Office by seeking production of the formal Order, that Order was silent as to the offence for which the conviction had been entered. Indeed, subsequent correspondence from that office merely stated that the judge *"may have indicated during the hearing that he had decided to convict"*. It was submitted that this left the entire question as to whether there was a conviction and, if so, of what offence, entirely up in the air. As far as the applicant's solicitor was concerned the trial judge had clearly indicated upon questioning by her, that he had convicted the applicant of an offence under s. 19 (1) of the 1994 Act, as amended. It was submitted that if the Court held with the applicant on that point, that was the end of the matter, as it was conceded that the District Court Judge had no jurisdiction to convict of that offence in the absence of any election to summary disposal of the matter having been made by the accused.

16. As an alternative ground of challenge to the Order made in the District Court, counsel submitted that while there was wide power of amendment given to the District Court Judge in respect of a charge sheet by virtue of Order 38 of the Rules of the District Court, there were procedures which had to be followed so as to ensure that any such amendment of a charge sheet, would not be done in such a way as to prejudice the accused's right to a fair trial. In this regard counsel referred to the decision in *DPP v. Tallon* [2007] 2 IR 230. In particular, the court was referred to the dicta of Mac Menamin J. as follows:

> *"The power of amendment invested in the courts by rule must be exercised judicially and fairly. It cannot be seen as a 'carte blanche' to defeat fairness or established legal rights, or so as to entirely reconstitute a case in form or substance in a manner fundamentally prejudicial to an accused."*

17. Counsel submitted that in this case there was no clarity as to whether the District Court Judge had exercised his power to amend the charge sheet so as to specify any particular subsection of s. 19, and if so, to identify which subsection he was referring to, nor had the applicant through his solicitor been offered an adjournment so as to take instructions from her client in the wake of any such amendment being made.

18. The applicant's solicitor had applied at the close of the prosecution case to have the matter struck out on the basis that the charge sheet was void for lack of certainty, in that it had not specified which of the two offences named in s. 19 was the offence with which the accused was charged. In response to that, the learned District Court Judge had merely indicated that he had a power to amend the charge sheet pursuant to some case, which he did not identify to the applicant's solicitor. It was submitted that where (a) it was not clear that the District Court Judge had actually amended the charge sheet or (b)

if he had done so in what respect he had done so, and (c) he had not indicated the legal authority on which he purported to have done so; in such circumstances the conviction, for whatever offence it may have been, was unsatisfactory and should not be allowed to stand.

19. Ms. Egan B.L. on behalf of the respondent submitted that if the applicant's solicitor had a difficulty with the particularity of the charge specified in the charge sheet, she ought to have raised that at the outset of the trial. In response to that counsel for the applicant stated that there was no such obligation on the applicant's solicitor and she was perfectly entitled to raise whatever objections she thought appropriate at the close of the prosecution's case.

20. Counsel for the respondent further submitted that as no conviction had formally been entered against the applicant, nor had any sentence been imposed, the application herein was premature. The logical and sensible course of action to take if there was a lack of clarity, was simply to return to the District Court Judge who had dealt with the matter and seek clarification from him, notwithstanding that the respondent made the case that it was perfectly clear that the conviction had been for an offence contrary to s. 19 (3).

21. Ms. Egan B.L. stated that the *Tallon* case was not relevant as that case concerned amendment to a charge sheet prior to the trial beginning, where a person was not clear as to what charge they were actually facing at the trial. She stated that such was not the case here, as the charge sheet specifically referred to the offence of resisting arrest, which was the charge provided for in respect of an offence contrary to s. 19 (3) of the 1994 Act.

22. Counsel further submitted that this case did not come within the decision in *Lynch v. Anderson* [2010] IEHC 284, where the charge sheet simply alleged that the applicant, having entered a building as a trespasser, "*did commit an arrestable offence to wit burglary therein…*". There were two separate charges provided for under s. 12 of the Criminal Justice (Theft & Fraud Offences) Act 2001 being firstly, unlawfully entering a property and actually committing an arrestable offence thereon, and secondly, unlawfully entering a property with the intention to commit an arrestable offence thereon. The Supreme Court held that the charge sheet must specify which charge was being preferred. However, that was not applicable in this case, as there was a clear description of the offence given. While the particular offence under s. 19 (3) had not been identified by reference to its subsection, the particulars given made it clear that that was the subsection that was referred to in the charge sheet. Furthermore, the evidence actually led at the trial was also in conformity with that offence. In these circumstances, it was submitted that the applicant had no genuine case, which was based solely on the error made by the District Court Judge in nominating the wrong subsection in his verbal exchange with the applicant's solicitor at the conclusion of the trial.

Conclusions

23. The facts in this case are not in dispute between the parties. The account of the evidence given by the various prosecution witnesses as set out in Statement of Grounds has not

been challenged by the respondent. The transcript drawn up by the applicant's solicitor from listening to the relevant portion of the DAR in respect of her exchange with the District Court Judge at the conclusion of the prosecution case, has likewise not being challenged as being inaccurate or misleading. Finally, it has been conceded by the respondent, and I think quite rightly, that if the Court were to find that the applicant had indeed been convicted by the District Court Judge of an offence pursuant to s. 19 (1) of the 1994 Act, that conviction could not stand, as the applicant had not been put to his election, which was a prerequisite of the District Court having jurisdiction in the matter.

24. This brings me to what is the central issue in this case: was the applicant convicted of an offence at the trial held at Virginia District Court on 19th October, 2018? If so, in respect of what exact offence was he convicted?

25. In relation to the first question, I am satisfied that while the actual Order that was drawn up did not record a conviction, it is clear from the DAR recording and from the evidence given by Ms. Taaffe, that the District Court Judge had in fact made up his mind to convict the applicant of an offence. That this is so is borne out by the fact that he went on to issue a warrant for the arrest of the applicant, which was to bring him before the court for the purpose of sentencing. In these circumstances, I am entirely satisfied that the District Court Judge had decided at the conclusion of the evidence tendered at the trial, that he was going to convict the applicant of an offence. As Ms. Taaffe correctly pointed out in her letter to Cavan Court Office dated 7th November, 2018, there was to be no revisiting of the issue of guilt or innocence subsequent to the arrest of the applicant pursuant to the order made on 19th October, 2018.

26. The question then arises as to what exact offence was the applicant convicted of on that occasion. While Inspector Gahan has made an arguable case that the applicant was convicted of an offence contrary to s. 19 (3) of the 1994 Act, I do not think that this Court or indeed, anyone else looking at the transcript of the DAR recording, can come to that conclusion. In order to do so, one would have to come to the conclusion that when specifically asked what offence the accused had been convicted of, the District Court Judge had been mistaken when he said twice in the course of that exchange, that the accused was convicted of the offence contrary to s. 19 (1) of the 1994 Act.

27. Where a judge issues a pronouncement in open court, this Court cannot make an assumption that the judge has made a mistake in so doing. If a judge does make a mistake, which can happen given the sometimes fraught nature of exchanges in a busy court list, it is up to both legal representatives present in court to draw this to the attention of the judge as soon as possible. It is noteworthy that at that hearing when the court indicated that the conviction was for an offence contrary to s. 19 (1), Inspector Gahan did not step in and point out to the judge that that was inconsistent with his prior indication that he was going to convict of the lessor or latter offence. While I accept that having regard to the particulars of the charge set out in the charge sheet, the nature of the evidence given by the prosecution witnesses and the indication given by the trial judge of the offence which had been proven against the accused, there is certainly a case

to be made that he was mistaken when he indicated that the conviction was pursuant to s. 19 (1). However, where a judge indicates s. 19 (1) on two occasions in open court, this Court cannot gainsay those pronouncements.

28. Normally the formal Order which is drawn up and signed by the Judge of the District Court, constitutes proof of the actual Order made by the judge at the particular hearing. However, in this case, the operative part of the Order merely recites that the accused was to be arrested and was to be brought before Judge McLaughlin or another judge to be dealt with according to the law. This is clearly at odds with the content of the verbal exchange between Ms. Taaffe and the judge, as set out in the transcript of the DAR recording, in that it fails to record any conviction against the accused. However, based on the DAR recording I am satisfied that Judge McLaughlin had decided to convict the applicant of an offence and I am satisfied on the basis of his exchange with Ms. Taaffe that he stated that that conviction was in respect of an offence contrary to s. 19 (1). I cannot go behind what the District Court Judge said in open court. That being the case, I must find that the applicant was convicted of an offence pursuant to s. 19 (1) of the 1994 Act and, it being conceded on behalf of the respondent that such a conviction cannot stand, I will grant the reliefs sought at paragraph 1 of the notice of motion and quash the conviction and Order made against the applicant in Virginia District Court on 19th October, 2018, and I will remit the matter back to the District Court for a rehearing.

29. In these circumstances, it is not necessary for me to decide the point in relation to the alleged unfairness in relation to the alleged amending of the charge sheet by the District Court Judge. However, even if I am wrong in my conclusions set out above in relation to the first ground on which relief is sought, I would also grant *certiorari* of the Order made in the District Court due to the uncertainty that exists in relation to (a) whether the District Court Judge did in fact amend the charge sheet, (b) in what way he amended it and (c) the legal basis on which he did so, given that he refused to identify the legal authority on which he was relying. Furthermore, as an amendment appears to have occurred at the end of the prosecution case, it seems that the procedures envisaged by Order 38 of the Rules of the District Court and in particular the provisions which ensure that an accused is not prejudiced by the making of a late amendment, were not followed in this case and on this ground as well, I would quash the conviction and direct the rehearing of the matter in the District Court.