Neutral Citation Number: [2011] IEHC 138

THE HIGH COURT

2010 416 JR

BETWEEN

MARY DELANY

APPLICANT

AND

JUDGE DONNCHADH O BUACHALLA AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice McMahon delivered on the 24th day of March, 2011

1. The applicant was convicted in the District Court on 19th January, 2010, of the offence of driving with an excess of alcohol in her urine contrary to s. 49(3) of the Road Traffic Act 1961 (as amended). The summons alleged that the offence was committed on 25th August, 2008.

2. Section 49(3) of the Road Traffic Act 1961, as substituted by s. 10 of the Road Traffic Act 1994, reads:-

> "A person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while there is present in his body a quantity of alcohol such that, within 3 hours after so driving or attempting to drive, the concentration of alcohol in his urine will exceed a concentration of 107 milligrammes of alcohol per 100 millilitres of urine."

3. Because it is relevant to the applicant's argument, I also set out a corresponding offence in s. 50(3) of the same Act (as substituted by s. 11 of the Road Traffic Act 1994):-

> "A person shall be guilty of an offence if, when in charge of a mechanically propelled vehicle in a public place with intent to drive or attempt to drive the vehicle (but not driving or attempting to drive it), there is present in his body a quantity of alcohol such that, within 3 hours after so being in charge, the concentration of alcohol in his urine will exceed a concentration of 107 milligrammes of alcohol per 100 millilitres of urine."

4. It is clear that the main difference between the two sections is that s. 49(3) makes it an offence when a person "drive(s) or attempts to drive", whereas s. 50 makes it an offence when a person is "in charge…within intent to drive or attempt to drive the vehicle (but not driving or attempting to drive it)" with an excess of alcohol in his body.

5. The relevant evidence in the District Court was given by Garda Ronan O'Meara and by a Mr. James Merrigan. Mr. Merrigan gave evidence that he left a friend's house at 11.45 p.m. on 24th August, 2008, and as he walked towards his car he saw that another car had scraped along the side of his car. He said that the applicant, Mary Delany, was sitting in the other car. He said the ignition was still running and he switched off the ignition and turned off the lights. He then called the gardaí "at around 12 o'clock". In cross-examination, Mr. Merrigan confirmed that the car was at a stop when he first saw it and that having switched off the engine he left the keys in the ignition. He further said that having left his friend's house at 11.45 p.m. it would have taken him about one and a half to two minutes to reach the car.

6. Garda O'Meara gave evidence that he arrived at the scene at 12.05 a.m. on 25th August, 2008. He said the keys were in the ignition of the car but the engine was turned off. He also confirmed that he had not seen the applicant driving.

7. At the end of the State's case, the solicitor for the applicant applied for a direction on the grounds that there was no evidence that the applicant was driving and in particular that the applicant was driving on 25th August, 2008, as alleged in the summons. The first respondent, Judge Donnchadh O'Buachalla (hereafter "the first respondent" or "the District Judge") listened to the application and asked the prosecuting inspector for his comment. The inspector argued that there was evidence to convict and specified in particular that there was evidence that the keys were in the ignition when the gardaí arrived at the scene. The applicant's solicitor replied that the evidence might have disclosed an offence under s. 50 of the Road Traffic Act 1961, but it did not disclose the offence alleged, which was that the applicant "drove" or attempted to drive a mechanically propelled vehicle. The District Judge refused the application and asked the applicant whether she was going into evidence. When the solicitor for the applicant asked for reasons for the refusal, the District Judge said that he "had heard all the evidence". In the event, the applicant did not give any evidence and she was convicted of an offence under section 49.

8. It should be noted that the State also gave evidence, which was not challenged, of the level of alcohol in the applicant's urine which showed that the applicant greatly exceeded the statutory limit.

9. On 2nd February, 2010, an appeal was lodged to the Circuit Court for the purpose of placing a stay on the conviction and sentence.

10. The applicant then commenced these proceedings seeking an order of *certiorari* against her conviction. Leave was granted and the grounds on which it was based included the following:

> (a) failure by the District Judge to give any or any adequate reasons for his refusal to dismiss the charge and to convict the applicant;
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> (b) failure to give the applicant or her legal representative a proper hearing contrary to the principles of natural justice;

(c) departing from the requisite standards of impartiality and open-mindedness;

(d) acting irrationally and/or unreasonably in failing to dismiss and in convicting the applicant; and

(e) insufficient evidence to convict the applicant of the offences filed against her.

11. At the hearing, the applicant's arguments focused mainly on (a), (b) and (e). Paraphrasing the oral submissions, the applicant said that there was no evidence that the applicant was driving on 25th August, 2008, and that in failing to give reasons for his refusal to grant a direction, the District Judge failed to give the applicant a fair trial.

12. The second respondent, the Director of Public Prosecutions, argues that this is not an appropriate case for *certiorari* and, since the District Judge was clearly within jurisdiction, the Court should not judicially review his decision, particularly since what was at issue was the sufficiency of evidence before the District Judge.

13. In judicial review proceedings, such as we have here, the law is clear that it will intervene only when the judge has acted outside jurisdiction. Whenever the judge has acted within jurisdiction, but has made an error, judicial review will not lie. I am of the view on the facts of this case that the learned District Judge was acting within jurisdiction at all times and consequently the exercise of his discretion is not subject to judicial review.

14. In relation to this point the second respondent makes reference to O. 38(1) of the District Court Rules 1997 which deals with the position where there is a difference between the complaint and the evidence as to the time of the offence:-

> "1.(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;… 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."

15. *Director of Public Prosecutions v. Cunniffe* (Unreported, High Court, Ó Caoimh J., 10th February, 2003), was a case stated from the District Court to the High Court where the alleged offence (as here) straddled midnight. Ó Caoimh J. referred to the wide discretion vested in the District Court and held as follows:-

> "…I will answer the question posed by stating that the evidence of Garda Cunniffe (*sic*) was such as to support the accusation against the accused of contravening s. 49 of the Road Traffic Act and whether the driving in question is found to have been on the 2nd July, 2001 or alternatively on the 1st July, 2001 is a matter that may enable the district court judge, depending on the circumstances, to proceed with the accusation as if there was no defect in the summons setting forth the accusation or alternatively, if considered appropriate, to amend the statement of the offence as set forth in the summons before the court, assuming that the court concludes that the evidence is such as to show a variance between the statement of the offence and the evidence before the court." (*Ibid*, at p. 10)

16. Cunniffe was a case stated but in *Grodzicka v. Ní Chondúin* [2009] IEHC 475, (Unreported, High Court, Dunne J., 30th October, 2009), Dunne J. was confronted with the same jurisdictional issue in judicial review proceedings. Holding that decisions relating to the amendment of charges are not amenable to judicial review since ordinarily they can only consist of errors within jurisdiction, she said:-

> "It seems to me that there are a number of difficulties in the application before me. First of all, assuming that the District Judge in this case made an error of law in amending the charge sheet, such an error could only have been an error made within the jurisdiction of the court and as such, the decision is not amenable to judicial review by way of *certiorari*. If the applicant were to be convicted on foot of the amended charge sheet, the Applicant could appeal to the Circuit Court or could invoke the procedure of Appeal by way of Case Stated…" (*Ibid*, at p. 18)

17. Given that the first respondent could have amended the summons or proceeded without amendment, he clearly had a wide discretion in the matter and even if he exercised it in error his decision in this matter is not amenable to judicial review. Although the District Judge is not recorded as having done so explicitly, I am prepared to find that in the circumstances he proceeded with the accusation as if there was no defect in the summons or alternatively implicitly amended the summons by rejecting the application for a direction. In either event he was clearly acting within jurisdiction in my view. This finding by the Court is sufficient to determine this matter, but since other arguments were advanced at some length by counsel for the applicant, I will comment briefly on the two arguments which counsel for the applicant stressed at the oral hearing, that is, the fact that (a) there was no evidence that the applicant was driving on 25th August, 2008; and (b) the first respondent gave no reasons (or insufficient reasons) as to why he refused the application for a direction at the end of the State's evidence.

18. In *Lennon v. District Judge Clifford* [1992] 1 I.R. 382 at 385, O'Hanlon J. quoted with approval the following passage from Halsbury's *Laws of England* (3rd Ed.), Vol. 11 at para. 119:-

> "Where the proceedings are regular on their face and the inferior tribunal had jurisdiction, the superior court will not grant the order of *certiorari* on the ground that the inferior tribunal had misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it… misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or misdirects itself as to the weight of the evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction…
>
> *Certiorari* will not be granted to quash the decision of an inferior tribunal within its jurisdiction on the ground that the decision is wrong in matters of fact, and the Court will not hear evidence impeaching the decision on the facts… If there is any evidence, the Court will not examine whether the right conclusion has been drawn from it."

This passage was also quoted with approval by Kearns P. in *Doyle v. Judge Connellan & Anor.* [2010] IEHC 287, (Unreported, High Court, Kearns P., 9th July, 2010) at p. 12 of the judgment.

19. Again in *Truloc Ltd. v. District Judge MacMenamin* [1994] 1 I.L.R.M. 151 at 155, O'Hanlon J. again stated in this context:-

> "I do not consider that it is part of the function of the High Court on an application for judicial review, to examine in detail

the evidence tendered in support of a prosecution in the District Court for the purpose of assessing whether, in the opinion of the High Court judge that evidence was sufficient to support the conviction which has been entered against a defendant."

20. In cases which are not fundamentally flawed the remedy is to appeal the decision (see *Doyle v. Judge Connellan & Anor. (supra)*). In *Sweeney v. Brophy* [1993] 2 I.R. 202 at 211, Hederman J. said:-

> "In my judgment *certiorari* is an appropriate remedy to quash not only a conviction bad on its face or where a court or tribunal acts without or in excess of jurisdiction but also where it acts apparently within jurisdiction but where the proceedings are so fundamentally flawed as to deprive an accused of a trial in due course of law. I take this opportunity of emphasising that *certiorari* is not appropriate to a routine mishap which may befall any trial; the correct remedy in that circumstance is by way of appeal." (See also *Buckley v. Kirby* [2000] 3 I.R. 431, *per* Geoghegan J. at p. 433 *et seq*)

(a) There was no evidence

21. The applicant argues that there is no evidence that she was "driving" on the night in question. I disagree. If I am aroused from my sleep in the night by a loud crashing noise on the roadway in front of my house, and I dress quickly and immediately investigate it with a bright torch and find a motor vehicle smashed against the telegraph pole, with steam coming from the radiator, the windscreen smashed and a person slumped over the steering wheel with blood streaming from his head and no one else in the vicinity, is it not evidence from which I can infer that the person behind the wheel was driving the car some moments prior to the crash? It may not be as good as direct evidence from witnesses who observed the person driving, but there is sufficient evidence to support an inference which in some instance would also be irresistible. It cannot be said that there was no evidence in that case. Of course, the hypothetical I have given could be weakened if I adjust the facts somewhat: if, for example, I waited until morning before investigating the noise or if, when I arrived, there were many other people at the scene.

22. In the present case, the District Judge determined that the applicant was driving "from all the evidence". From the evidence of Garda O'Meara and Mr. Merrigan, I am firmly of the view that when the applicant was found behind the steering wheel of the car with the keys in the ignition and the engine still running on the occasion in question, it was not unreasonable to infer that she had been driving the car some moments earlier. Once there is some evidence on this issue, it is not for this Court to review the District Judge's determination on the matter. If sufficiency of evidence is the complaint, the applicant if dissatisfied should appeal.

23. Counsel for the applicant then advances the argument that whatever evidence there may have been about the applicant driving, there was no evidence that the applicant was driving on 25th August, 2008, as she was charged. The applicant continues that the only evidence of driving, if any, was that it took place on 24th August and not on 25th August, as charged.

24. Is this significant in the circumstances? I think it is important to look closely at the various elements of the offence with which the applicant is charged. Section 49 of the Road Traffic Act 1961 provides that a person shall not drive or attempt to drive a mechanically propelled vehicle in a public place while he is under the influence of an intoxicant. The crucial elements therefore in this offence are:

> (i) that the person drives or attempts to drive;
>
> (ii) a mechanically propelled vehicle;
>
> (iii) in a public place;
>
> (iv) when under the influence of an intoxicant.

25. The offence cannot be committed unless all of these elements are proved. There is no issue on (ii), (iii) and (iv) here. The only issue relates to "driving or attempting to drive". The section, however, makes no reference to a particular time when the offence must be committed. The offence can be committed at any time of day or night. The time when the offence is committed is in that sense irrelevant. Time is not an essential element in the offence.

26. It is true, however, that the applicant was charged with having committed the offence on 25th August, 2008. What is the effect of such a temporal specification in the charge sheet?

27. It appears to me that mention of a specific time and date in the charge sheet, when the time factor is not an element of the offence, as it might be under the Shops (Hours of Trading) Act 1938 or the licensing legislation, for example, is only to enable the defendant to focus on the occasion in question so that he has a fair opportunity to meet the case. Such specificity may be necessary to enable him to recall the incident, to enable him to identify witnesses, to collect evidence (*e.g.* C.C.T.V. footage) or to furnish an alibi. It is, in that sense, something that goes to the fairness of the trial and not to the nature of the offence.

28. If one looks at the facts of the present case, therefore, can one say that by mentioning 25th August, 2008, in the charge sheet, the applicant was taken by surprise or is at some disadvantage in addressing the charge? I think not. There may, of course, be cases where such a discrepancy would be significant and where to ignore it would result in an unfair trial. This, however, in my view, is not one of them.

29. The applicant's argument on this issue seems again to be based on absence or insufficiency of evidence. At the risk of repetition, it is appropriate on this issue to quote Lord Brightman who in *Chief Constable v. Evans* [1982] 1 W.L.R. 1155 at 1173 said:-

> "I turn secondly to the proper purpose of the remedy of judicial review, what it is and what it is not. In my opinion the law was correctly stated in the speech of Lord Evershed [in *Ridge v. Baldwin* [1964] A.C. 40] at p. 96. His was a dissenting judgment but the dissent was not concerned with this point. Lord Evershed referred to "a danger of usurpation of power on the part of the courts… under the pretext of having regard to the principles of natural justice." He added:-
>
> > "I do observe again that it is not the decision as such which is liable to review; it is only the circumstances in which the decision was reached, and particularly in such a case as the present the need for giving to the party dismissed an opportunity for putting his case."
>
> Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself

guilty of usurping power."

This above passage was quoted with approval by O'Hanlon J. in *Lennon v. District Judge Clifford* [1992] 1 I.R. 382 at 386, who added that:-

> "The general tenor of the decisions is that the High Court is not available as a court of appeal from decisions of other tribunals except where it is given such a function by statute, and that the scope for challenging the validity of orders made by lower courts by way of judicial review proceedings is confined to those cases where reliance can be placed on want of jurisdiction, or excess of jurisdiction; some clear departure from fair and constitutional procedures; bias by interest; fraud and perjury; or decisions containing an error of law apparent on the face of the record."

30. For the reasons given above, I do not believe that the trial of which the applicant complains here can be described as one which was so fundamentally flawed that it attracts the entitlement to judicial review. In spite of the applicant's urgings, I do not believe that the District Court, which clearly had jurisdiction at the outset, fell into "unconstitutionality" during the trial, by refusing a direction in the circumstances described (see Henchy J. in *The State (Holland) v. Kennedy* [1977] I.R. 193 at 201).

(b) Bias

31. Another ground relied on by the applicant is that the District Judge in the conduct of the trial departed from the requisite standards of impartiality and open-mindedness. This ground, however, was not pursued in the oral submissions, understandably so in my view. There was no evidence in anything the District Judge said or did to suggest that he was biased. There was no evidence that a reasonable person looking at the way the District Judge conducted the case would apprehend that he had prejudged the matter or was biased in his handling of the hearing. (The test is an objective one: see *Dublin Wellwoman Centre Ltd. v. Ireland* [1995] 1 I.L.R.M. 408.) In *Fogarty v. Judge O'Donnell* [2008] IEHC 198, (Unreported, High Court, McMahon J., 27th June, 2008), I made the following statement in relation to bias which is not irrelevant to these deliberations:-

> "[I]t is important also that the judge does not give the appearance that he has prejudged a decision and in this respect he should take great care when expressing himself during the course of the trial that he does not express himself in language which would suggest that he has come to a hasty decision in the matter.
>
> Whether the language used by a judge during the course of a trial is such that it indicates bias in the sense that it shows that the judge has made up his mind before he has heard all the evidence, depends on the facts and circumstances of each case. The use of an infelicitous word or phrase during the trial by the judge should not always compel such a conclusion. To define bias one must look at the overall picture…" *(Ibid* at p. 4)

32. There is nothing in the evidence before me to suggest that the District Judge in this matter was in any way biased in hearing the case.

(c) Failure to give reasons

33. It is an inherent element of fairness and justice that when a person is convicted of a crime he should be furnished with the reasons and an adequate explanation for the conviction. He or she must know not only what the court's decision was but also the reasons why the court reached its decision. Confidence in the judicial process is based on the assumption that decisions are based on rational foundations and are not arbitrarily arrived at. Moreover, public confidence is best secured when the reasons for the decision are explained and furnished.

34. The onus which this places on a particular judge will vary in any given case. Clearly, it is more important in the higher courts where the issues may be complex and numerous, where frequently the parties have made written submissions and where the decisions are reserved by the judge for further consideration before being finally delivered. At this level, too, the reasons for the decision are very relevant for the parties and their advisers who have to consider whether an appeal should be taken or not. In contrast, in the lower courts, and in the District Court in particular, where heavy lists and crowded schedules do not always afford the district judge the luxury of reserving judgments, the judge does not always have the time to compose an articulate, orderly and expansive exposition of the reasons for the judgment. It is essential even in such cases, however, that the accused when leaving the court knows what he has been convicted of. There is no room for uncertainty in that aspect of the matter. In my view, it is also essential that the reasons for the conviction are likewise clear, although the judge may not have had the time to fully or comprehensively articulate the reasoning. In some cases, the reasoning may be obvious and may not require elaboration. This would particularly be the case where the judge prefers the evidence of one witness over the evidence of another on a critical matter or where the issue for determination is a single factual issue e.g. whether the defendant was driving at a speed which exceeded the permitted speed limit. There is no requirement for the judge in such situations to elaborate the obvious. A pragmatic view must be taken of the time pressures imposed on the district judge by heavy lists. Moreover, detailed reasons are less important where the appeal available from the District Court is a full *de novo* hearing. Finally, as already noted, the remedy of judicial review is always available in exceptional cases where the district judge falls into serious error. This may be so even when the district judge starts within jurisdiction but during the trial "fall[s] into an unconstitutionality." Such cases are, however, exceptional and relatively rare.

35. In the present case, the accused argues that the District Judge has fallen into such unconstitutionality in failing to give adequate reasons. I do not agree. In my view, the District Judge in refusing to give a direction stated quite clearly that he did so "having heard all the evidence". In doing so, he was prepared to find that there was evidence that the applicant was "driving" the vehicle and that all the other elements of the offence were present. It is also clear that in rejecting the submission by the applicant's counsel, he did not consider the date in the summons charge sheet fatal to the prosecution in the circumstances. There was no ambiguity in his decision and on the facts there was little reason to elaborate further on his reasoning. There can have been no confusion on the part of the accused. In these circumstances, I am unwilling to hold that there was unfairness to such an extent that the Court should hold, in the words of Henchy J., that the District Judge had fallen into "an unconstitutionality".

36. The duty to give reasons in summary criminal trial has been the subject of much comment in the Superior Courts in recent times. Murphy J. in *O'Mahony v. Ballagh* [2002] 2 I.R. 410 at 416, a case not unlike that before the court, made the following comments:-

> "At the conclusion of the State's case the applicant and his legal advisors were required to decide whether they should go into evidence or not. To make that decision it was essential to know which of the arguments were accepted and which rejected.
>
> I would be very far from suggesting that judges of the District Court should compose extensive judgments to meet some academic standard of excellence. In practice it would be undesirable - and perhaps impossible - to reserve decisions even for a brief period. On the other hand it does seem, and in my view this case illustrates, that every trial judge hearing a

case at first instance must give a ruling in such a fashion as to indicate which of the arguments he is accepting and which he is rejecting and, as far as is practicable in the time available, his reasons for so doing."

37. In that case, the district judge delivered himself of a remark which was open to different interpretations. In the case before this Court, however, there is no ambiguity in the few remarks made by the District Judge which would suggest bias. More recently, O'Neill J. in *Kenny v. Judge Coughlan* [2008] IEHC 28, (Unreported, High Court, O'Neill J., 8th February, 2008), referring to the duty to give reasons on summary trials, stated:-

> "[I]n giving decisions, District Court Judges need only make clear the nature of the decision they are making and in unambiguous terms, the basis for that decision. It could never be said that where a District Judge is presented with submissions on a series of legal points, he or she is obliged to provide a legal analysis of his/her reasons for accepting or rejecting any of them." (*Ibid*, at pp. 22 to 23)

38. The learned judge emphasised that since the appeal from the District Court is a full rehearing of the case, unlike appeals from the High Court to the Supreme Court, the necessity for detailed reasons is less compelling. In *Sisk v. Judge O'Neill* [2010] IEHC 96, (Unreported, High Court, Kearns P., 23rd March, 2010), Kearns P. quoted with approval the following dicta of Charleton J. in *Lyndon v. Collins* [2007] IEHC 487, (Unreported, High Court, Charleton J., 22nd January, 2007):-

> "Now I do not think that it is necessary…that District Judges give reserved decisions…to a high standard of academic excellence. What is essential, however, is that people know going out of any District Criminal Court what they have been convicted for and why they have been convicted." (Ibid, at p. 20)

39. That case also involved an application for a direction to which the district judge replied:-

> "I am not going to grant a direction. I do want to hear your client."

40. Kearns P. in *Sisk* concluded:-

> "I am satisfied that, in the event of an application being made for a nonsuit at the conclusion of the prosecution case, the obligation on a District Judge is to consider the sufficiency of the prosecution evidence when taken as a whole and taken at its highest.
>
> I do not believe there is an obligation upon a District Judge to furnish detailed reasons, or any reason for refusing such an application once he satisfies himself that the test in *R. v. Galbraith* [[1981] 2 W.L.R. 1039] has been met.
>
> Thus in the instant case I do not believe the learned District Court Judge was in error in refusing to give a detailed ruling on the application that there was no case to answer." (*Ibid*, at pp. 23 to 24)

41. For the above reasons, I am not prepared to concede that there was a failure by the District Judge in the present case to give adequate reasons for his decision.

Conclusion

42. By way of summary, therefore, I have come to the conclusion that the District Judge in this case was acting within jurisdiction and for that reason his decision is not amenable to judicial review. This is not one of those exceptional cases where during the hearing the judge has "fallen into an unconstitutionality". Because of this decision it is not necessary for me to entertain the other arguments advanced on behalf of the applicant. If they were to have a bearing on the ultimate outcome of this decision, I would be prepared to hold that:-

> (a) there was evidence that the applicant had committed the crime she was charged with;
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> (b) the fact that the date on the charge sheet was incorrect did not affect the fairness of the trial;
>
> (c) sufficient reasons were given in the circumstances of this case; and
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> (d) there was no evidence of bias.

43. I dismiss the application.

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